Lakes Pilots Association, Inc. *and* William B. Hanrahan

Interlakes Pilots Association District No. 2, Local 1921, International Longshoremen's Association, AFL–CIO *and* William B. Hanrahan. Cases 7–CA–33014, 7–CB–8840, and 7–CB–9105

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On September 13, 1993, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel, the Respondents, and the Charging Party filed exceptions and supporting briefs, and the Respondent Union filed an answering brief. The Charging Party also filed a motion to supplement the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that Lakes Pilots Association (the Respondent Employer) interfered with the administration of the Respondent Union and rendered assistance and support to it, in violation of Section 8(a)(2), because of the dominating role played by the Employer's shareholders in the affairs of the Union. The judge also found that the Employer unlawfully assisted the Union by providing it with free office space and telephone service. He found that, because of the Employer's shareholders' role in its affairs, the Union had a conflict of interest that prevented it from effectively representing the Employer's employees. The judge further found that, by maintaining and enforcing a collective-bargaining agreement containing a union-security clause, the Employer and the Union violated Section 8(a)(2) and (3) and Section 8(b)(1)(A) and (2), respectively. Finally, he found that the Union violated its duty of fair representation, in violation of Section 8(b)(1)(A), by arbitrarily failing and refusing to process certain grievances of the Charging Party, William Hanrahan. In the process of finding the violations, the judge rejected the Employer's contention that the charge against it is time-barred by Section 10(b) of the Act.

To remedy the violations, the judge ordered both Respondents to cease giving effect to the collective-bargaining agreement insofar as it applies to the Employer's shareholders. He ordered the Employer to cease allowing its shareholders to occupy positions in the Union, and ordered the Union to cease allowing the shareholders to be members. He also ordered the Employer to stop providing the Union with free office space and telephone service. The judge ordered the Union to process Hanrahan's grievances, to arbitration if necessary. In this regard, noting that the contract provided for the Employer and the Union each to appoint one member of the three-person arbitral panel, the judge ordered the Union to relinquish to its international parent its choice of a panelist.

The Respondents have excepted to all the violations found by the judge and to his remedy. The Employer has also excepted to the judge's finding that the allegations raised against it are not barred by Section 10(b). The General Counsel has excepted to the judge's failure to impose a conditional make-whole order to remedy the Union's failure to process Hanrahan's grievances. Hanrahan has excepted to the judge's failure to find him to be an independent contractor.

As we discuss below, we affirm the judge's findings that the Respondents violated the Act and that the charge against the Employer is not time-barred. However, for the reasons set forth below, we adopt the judge's remedy only in part, and we find no merit to

[1] The Respondent Employer has excepted to the judge's accepting into evidence certain letters from the Coast Guard to the Charging Party concerning his eligibility to become a fully registered pilot and for backpay stemming from his 1991 layoff. The Employer argues that it was prejudiced by not being able to cross-examine the author of the letters. We find no merit to this exception. The letters were admissible to show their impact on the parties' understanding of the Coast Guard's positions regarding various issues and on the parties' subsequent actions. The accuracy of the statements contained in the letters is not material to this proceeding. Consequently, the Employer was not prejudiced by its inability to cross-examine the author.

The Employer also has excepted to the judge's refusal to accept into evidence certain documents the Employer sought to introduce after the close of the hearing. We find no merit to that exception, because we agree with the judge that the proffered materials would not aid in the disposition of the matters before us. Two of the documents concern the dismissal of the Charging Party's earlier charge. One is a letter to the Charging Party from the General Counsel's office, explaining the dismissal of that charge; it adds nothing of substance to the uncontroverted evidence already in the record. The other is a letter faxed by the Charging Party to counsel for the General Counsel, expressing the former's opinions—which are irrelevant—concerning the dismissal of the earlier charge and its relevance to the charge in this case. The remaining documents are additional letters to the Charging Party from the Coast Guard, concerning the Charging Party's apparent refusal to comply with that agency's requirements for becoming a fully registered pilot. Those letters are not pertinent to the issue of whether the Union previously violated its duty of fair representation (as we find that it did); unlike the Coast Guard's earlier letters, they were written too late to have informed the parties' actions at issue here. And because we find, for the reasons discussed in part 3, below, that no affirmative remedy for this particular violation is required under the circumstances of this case, the letters are not relevant to the remedy either. Accordingly, we find that the Employer has not been prejudiced by the judge's exclusion of these materials.

either Hanrahan's exception or that of the General Counsel.

1. We agree with the judge, for the reasons stated in his opinion, that the Employer violated Section 8(a)(1), (2), and (3), and that the Union violated Section 8(b)(1)(A) and (2). Concerning the 8(a)(2) violation, we note that, although the judge referred at times to domination of the Union by the Employer and its shareholders, his conclusion of law (consistent with the complaint allegations) was that the Employer had unlawfully interfered with and assisted the Union, not that it had dominated the Union.[2] Neither the General Counsel nor the Charging Party has excepted to the judge's failure to include domination among his conclusions of law, or to his failure to order the disestablishment of the Union, which is the usual remedy for an 8(a)(2) domination. We therefore do not decide whether a domination violation could have been found had it been alleged in the complaint, or whether disestablishment of the Union would have been an appropriate remedy in that event.

2. We also adopt the judge's finding that the allegations against the Employer are not barred by Section 10(b).[3] We do so, however, only for the following reasons.

As the judge explained, the Charging Party, William Hanrahan, filed a charge against the Employer in Case 7–CA–31833 on April 30, 1991. That charge alleged that Hanrahan had been discharged without cause, in violation of Section 8(a)(3) and (1). In addition, the charge alleged that the Employer had achieved its ''corporate objectives'' by controlling the Respondent Union and included a number of factual allegations supporting the latter contention. Although the charge specifically alleged only an 8(a)(3) and (1) violation, the Regional Office investigated the possibility that the Employer dominated the Union. The Acting Regional Director found no merit to the allegation that Hanrahan had been unlawfully discharged and no evidence of unlawful domination of the Union by the Employer, and dismissed the charge. Hanrahan appealed the decision to the General Counsel, but his appeal was denied.

On March 9, 1992, Hanrahan filed the charge against the Employer in Case 7–CA–33014, alleging that it unlawfully dominated the Union, in violation of Section 8(a)(2), and was party to a contract with the Union that enabled the Employer to discriminate against employees because of their union activities, in violation of Section 8(a)(3) and (1). The Acting Regional Director issued a complaint based on this charge. The complaint alleges that the Employer is a corporation, the stock of which is wholly owned by the registered pilots, who have an active role in the Company's management, and who are also members of the Union and serve as the Union's officers. The complaint alleges that the registered pilots are managerial employees, and that through their membership in and participation in the affairs of the Union, the Employer has interfered with the administration of, and rendered unlawful assistance to, the Union in violation of Section 8(a)(2). The complaint further alleges that the Employer violated Section 8(a)(3) and (1) by maintaining in effect and enforcing a collective-bargaining agreement with the Union that requires employees, including those who are not registered pilots, to become and remain members of the Union as a condition of employment, despite the Employer's alleged unlawful interference in the affairs of the Union and the conflict of interest on the part of the Union that assertedly has resulted from that interference.

The Employer has consistently argued that the charges against it are time-barred by Section 10(b). It argues that the charge in Case 7–CA–33014 is nothing more than a reinstatement of the dismissed charge in Case 7–CA–31833, and that, under *Ducane Heating Corp.*,[4] a complaint could not properly issue based on similar charges filed more than 6 months after the events that were the subject of the dismissed charge.

The judge agreed ''to an extent.'' Thus, he acknowledged that the facts on which the 8(a)(2) allegations of the complaint are based were in large part the subject of the dismissed charge. He also observed, however, that the 1992 charge alleges that the Employer dis-

[2] In support of his conclusion that the Employer interfered with and assisted the Union, the judge found that union members who are not registered pilots and shareholders of the Employer are not allowed to vote on union affairs. The Employer contends that that finding is contrary to the Union's constitution and bylaws, which provide that ''Nonpilot members are not permitted to vote on issues related to pilotage, but shall have the right to vote in manners [sic] relating to their interests.'' Union President Kanaby, however, testified without qualification that only registered pilots are allowed to vote in elections ''or other Union activities.'' We find that the judge implicitly credited Kanaby's testimony over the somewhat ambiguous provisions of the bylaws. We also note that, in any event, the registered pilots greatly outnumber the nonpilot members of the Union; therefore, even if nonpilots have limited voting rights, the pilots/shareholders would be able to outvote them at any time. As the pilots/shareholders also are the only members who are allowed to hold union office and to serve as members of the Union's bargaining committee, we find that the judge's conclusion that the Employer unlawfully interfered with and assisted the Union is well supported by the record. Those factors clearly distinguish this case from *Power Piping Co.*, 291 NLRB 494 (1988), and *Hoyt, Brumm & Link, Inc.*, 292 NLRB 1060 (1989), cited by the Employer.

Because we agree with the judge that the Employer interfered with and assisted the Union in other, more serious ways, we adopt his finding that the Employer also violated Sec. 8(a)(2) by providing the Union with free office space and telephone services. It is not necessary for us to decide whether the latter forms of assistance would be unlawful if the other 8(a)(2) violations had not been committed.

[3] Sec. 10(b) of the Act provides that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]''

[4] 273 NLRB 1389 (1985).

criminated against Hanrahan because of its domination of the Union, and further noted that the evidence of discrimination was used to support the allegation that a disabling conflict of interest exists on the part of the Union. In this regard, the judge continued, evidence in support of the 1992 charge includes the Employer's refusal to award Hanrahan backpay and lost benefits for the 1991 shipping season and the Union's failure to grieve that refusal. The judge found that that evidence is not time-barred and that there thus exists an independent basis for the timely charge. The judge found that the 1992 charge is closely related to the earlier dismissed charge, in that the otherwise untimely allegations arise from the same operative facts, involve the same legal theory, and would require the same or similar defense, as those in the 1992 charge. He therefore found that the earlier allegations are not time-barred.[5]

In its exceptions, the Employer continues to press its argument that the 1992 charge is simply the tardy reinstatement of the dismissed 1991 charge and that, consequently, the later charge is untimely under *Ducane*. The Employer further contends that, contrary to the judge's view, there was nothing timely about the Union's failure to grieve the Employer's alleged improper conduct. Even assuming, arguendo, that the conduct cited by the judge fell within the 10(b) period, the Employer continues, it is at most a timely manifestation of its earlier alleged domination of the Union, based on facts that were known at the time the earlier charge was dismissed. Moreover, the Employer asserts that even if the acts relied on by the judge otherwise would constitute the basis for a timely charge, in this case they are time-barred because they are neither separate nor distinct from the conduct that was the subject of the earlier charge, but rather are entirely consistent with that conduct.[6] Finally, the Employer contends that the timely evidence of domination is inextricably linked to the now time-barred conduct alleged to be unlawful in the dismissed charge, and therefore that the judge erred in applying the ''relation back doctrine'' to the evidence in this case.[7]

We reject the Employer's contention that the charge against it was untimely filed, but not entirely for the judge's reasons. To begin with, we disagree with the Employer's assertion that the 1992 charge is merely a reinstatement of the dismissed 1991 charge. The 1992 charge explicitly alleges unlawful conduct on the part of the Employer since (at least) September 6, 1991—after the earlier charge had been filed and dismissed, and after the dismissal was upheld by the General Counsel. Insofar as it refers to conduct that occurred since September 6, 1991, the 1992 charge thus could not be based on the discrete acts alleged in the earlier, dismissed charge. Moreover, the judge based his finding of unlawful domination on institutional factors—i.e., the registered pilots' status as managerial employees and their control of the Union—that were present at the time Hanrahan filed his earlier charge, but that continued to exist during the 10(b) period. The charge in this case thus is based on institutional factors that existed contemporaneously with the filing of that charge; it does not depend at all on acts that occurred or arrangements that existed only prior to the 10(b) period. Consequently, there is no merit to the Employer's argument that it is merely a reinstatement of the dismissed charge. Both the Employer and the judge, then, are incorrect in supposing that *Ducane* applies in this case.

For essentially the same reasons, the Employer's reliance on *Leeward Nursing Home* and *Chemung Contracting* is misplaced. In both of those cases, the Board, following the Supreme Court's teaching in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), dismissed as untimely allegations of unlawful conduct that occurred during the 10(b) period because the unlawful character of that conduct could be proved only by reference to conduct that had taken place *before* the 10(b) period. In those cases, however, as in *Bryan Mfg.*, the acts occurring during the 10(b) period were not, in themselves, unlawful; proof of their unlawful character depended on a showing that some other unlawful act had taken place. As the earlier unlawful conduct had taken place prior to the 10(b) period, the acts committed during the 10(b) period were not found to be unlawful, because their unlawful character could be proved only by reference to time-barred conduct. That is not the situation here. The Employer was alleged, and shown, to have interfered with and assisted the Union *during* the 10(b) period. That is not conduct that would be lawful but for the commission of some other unlawful act prior to the 10(b) period; it is unlawful in and of itself. Consequently, the complaint allegation is not untimely under *Bryan Mfg.* and its progeny.[8]

We do find that the judge improperly considered the allegations in the dismissed charge not to be untimely because they are closely related to those of the March 1992 charge. Although the allegations of the two charges are, indeed, closely related, the earlier ones are

[5] The judge cited *Nickles Bakery of Indiana*, 296 NLRB 927 (1989). He also noted that the violations alleged on the part of the Union are based on the Union's relationship with the Employer, and suggested that because the allegations against the Union are not time-barred, neither are those against the Employer. We disavow that suggestion. As the Employer argues, there is no basis for finding an otherwise untimely charge against one party to be timely merely because the facts underlying the charge are closely related to the issues in a timely filed charge against a different party.

[6] The Employer relies on *Chemung Contracting Corp.*, 291 NLRB 773 (1988).

[7] The Employer cites *Leeward Nursing Home*, 278 NLRB 1058, 1066 (1986).

[8] See *NLRB v. Erie Marine, Inc.*, 465 F.2d 104, 107–108 (3d Cir. 1972).

not timely to the extent they are based on acts that did not take place within 6 months before the charge in this case was filed.[9] The judge's error in this regard was harmless, however, because, as we have noted, the violations he found on the part of the Employer are fully supported by conduct that occurred during the 10(b) period.

We note, in this regard, that the judge found unlawful interference with and assistance to the Union principally because he found that all the registered pilots, who make up the majority of the Union's membership, all of its officers, and all members of its bargaining committee, are managerial employees. He based the latter finding, which we adopt, in part on evidence that, as of April 1, 1991, it was impossible to assemble a five-person board of directors of Lakes Pilots who collectively would have owned a majority of the Company's stock. Thus, the pilot shareholders who were not directors possessed the power to control management of the Employer. (Of the 118 shares owned by 14 active pilots at the time, a maximum of 50 could have been owned by directors, because no pilot owned more than 10 shares.[10] April 1, 1991, is outside the 10(b) period, however, and it is possible that shifts in ownership could have occurred since then that would have rendered the judge's finding inaccurate during the 10(b) period. No party makes that contention, however, and other evidence is to the contrary. Lakes Pilots' President Green testified that in 1992, there were 12 or 13 active pilots. Assuming that there were only 12 (a reduction of 2 since 1991), and further assuming that the two who were no longer active each had owned 10 shares in 1991 but owned those shares no longer, there would have been 98 shares owned by active pilots; a 5-man board of directors, each of whom owned 10 shares, would have had numerical control of the Company. As the board was constituted after December 1990, however, no more than 4 directors owned 10 shares; Director Singler owned only 6.[11] Collectively, then, the board owned only 46 shares, which would have been less than a majority even under the assumptions above. Consequently, and in view of the fact that no party contends otherwise, we find that the judge's findings concerning the pilots' stock ownership in April 1991 were also valid during the 10(b) period.

For all the foregoing reasons, we find that the Employer has not carried its burden of demonstrating that the charges against it are time-barred.[12] In so finding, we emphasize that we rely only on conduct occurring during the 10(b) period and not on conduct prior to that period (except to the extent the time-barred conduct sheds light on the character of the conduct that took place during the 10(b) period).

3. The judge found that the Union violated Section 8(b)(1)(A) of the Act by failing to process Hanrahan's grievances against the Employer concerning the latter's failure to recommend him to the Coast Guard for registration as a United States registered pilot and its liability, if any, for earnings and benefits lost as a result of his termination or layoff during the 1991 shipping season. The judge ordered the Union to process those grievances to arbitration, if necessary. He did so over Hanrahan's protest that, because of the Employer's control of the Union, the Employer is effectively able to appoint a majority of the arbitral panel. (The contract provides for a three-member arbitral panel, comprising one member assigned from the Employer, one member from the Union, and one neutral member.) Because he agreed with Hanrahan regarding the Union's conflict of interest arising from its relationship with the Employer and the potential for a biased arbitral panel, the judge recommended that the Union be ordered to have the International Longshoremen's Association (ILA), which has no such conflict of interest, select the panelist that otherwise would be chosen by the Union.

The Respondents except. The Employer argues that neither the registration issue nor Hanrahan's backpay claim is a dispute or controversy arising under the collective-bargaining agreement,[13] that the Union therefore could not have filed a cognizable grievance concerning either matter, and consequently that the Union did not violate its duty of fair representation by failing to grieve either matter. The Union contends that whether Hanrahan is to be registered is a matter that is beyond the scope of the Union's authority and that has, in any event, been placed before the Coast Guard, which is the agency that has the authority to register him as a pilot. The Union also argues that Hanrahan's backpay grievance is nonmeritorious. Accordingly, the

[9] See *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). We find, however, that the judge properly relied on certain time-barred conduct—e.g., the nomination of Union President Kanaby by Lakes Pilots President Green—to shed light on the character of the relationship between the Employer and the Union during the 10(b) period. *Bryan Mfg.*, 362 U.S. at 416.

[10] Indeed, Hanrahan testified that no pilot was permitted to own more than 10 shares.

[11] Green's testimony establishes that Singler was a director in 1992. As the charge in this case was filed on March 9, 1992, Singler's status as a director persisted during the 10(b) period.

[12] See, e.g., *Furniture Workers Local 76B (Office Furniture)*, 290 NLRB 51, 61 fn. 44 (1988).

[13] Art. IX of the collective-bargaining agreement provides that

> [a]ny dispute or controversy which may arise as to the interpretation or application of any of the provisions of this Agreement, including all matters herein which expressly provide that they shall be dealt with in accordance with this clause, shall be referred to an Arbitration Committee for adjustment or decision, as provided herein.

Union contends, the judge erred in ordering the processing of both grievances.[14]

Both Respondents argue that the judge further erred in ordering the Union to have the International Union select the union representative on the arbitration panel. The Employer contends that the composition of the arbitral panel is a matter of contract negotiated by the parties, and that forcing the parties to accede to a procedure against their will violates Section 8(d) of the Act.[15] The Union excepts to this provision on the ground that the International Union was not a party to the dispute and is not a respondent in this proceeding.

We agree with the judge that the Union violated its duty of fair representation by failing to process Hanrahan's grievances. The record supports the judge's finding that the Union failed to pursue those grievances because of its conflict of interest, not because Hanrahan failed to ask that the issues be grieved or because they were not grievable or meritorious.[16] In this regard, we agree with the judge's finding that the Union knew that Hanrahan wanted the Union to pursue the registration issue. We further note that, in fact, the Union apparently considered that issue to be potentially grievable. The minutes of the Union's executive board meeting on August 13, 1991, state in part:

> The Wm. Hanrahan case was discussed, it was decided that when President Kanaby receives a letter from John Baker, President Great Lakes district we will investigate the matter and if indeed all of the requirements have been met by Brother Hanrahan the Union will petition the Lakes Pilots Association for full registration for Brother Hanrahan.

Nor was the Union alone in its perception that the registration issue could be grieved. The International Union evidently thought so, too. As the judge noted, ILA Great Lakes District President Baker informed Kanaby, by letter dated August 27, 1991, that he saw no problem in taking Hanrahan's registration grievance to the Employer and, if need be, to arbitration. As for Hanrahan's backpay claim, there is no doubt that he expressly demanded the Union's assistance in ''recovering all back pay, special pays, pension contributions and all other benefits due me.'' The Union simply ignored this request. We therefore find that the record supports the judge's finding that the Union's proffered reasons for not processing Hanrahan's grievances were pretextual.

Although we affirm the judge's finding that the Union violated Section 8(b)(1)(A), we adopt his remedy only in part. We adopt his affirmative order requiring the Union to process Hanrahan's backpay grievance. Contrary to the Respondents, we do not find that that grievance has been shown to lack merit. Thus, although the collective-bargaining agreement states that the Employer has the right to lay off applicant pilots, it also provides that nothing in the agreement shall be construed contrary to applicable laws and regulations. The Coast Guard informed Hanrahan and the Employer in late 1991 that Hanrahan remained an applicant pilot and that the Employer was obligated to tender him all the emoluments consistent with that status. Thus, an arbitrator might find that the Employer actually was not entitled to lay Hanrahan off, because that action could be construed as inconsistent with the Coast Guard's position that he remained an applicant pilot;[17] in that event, Hanrahan might indeed be entitled to recover backpay and benefits for the period of his layoff. In these circumstances, the presumption is in favor of arbitration.[18]

Unlike the judge, however, we decline to order the Union to process Hanrahan's grievance concerning the Employer's failure to recommend him to the Coast Guard for full registration. Faced with the Union's inaction, Hanrahan took his cause directly to the Coast Guard, which informed him in detail of what he must do to satisfy the requirements for full registration. It thus appears that the issue is now out of the hands of the Union and even of the Employer. It has been

[14] The Union also contends that, under the judge's decision, it is not a labor organization and therefore owes Hanrahan no duty of fair representation. It further contends that the judge erred in ordering it to process Hanrahan's grievances because the judge found that the collective-bargaining agreement, which contains the grievance-arbitration procedure, is unenforceable. There is no merit to either argument. The Union admitted that it is a labor organization. In any event, a union does not lose its status as a labor organization merely because of employer interference or conflict of interest. See *Sierra Vista Hospital*, 241 NLRB 631, 632 (1979). A contrary holding would effectively read Sec. 8(a)(2) out of the Act. The judge did not find that the collective-bargaining agreement was unenforceable with regard to applicant pilots like Hanrahan.

[15] Sec. 8(d) provides that the obligation to bargain collectively ''does not compel either party to agree to a proposal or require the making of a concession.''

[16] We therefore reject the Respondents' argument that the Union did not violate Sec. 8(b)(1)(A) by failing to process the backpay grievance because (in their view) the grievance lacked merit. A union violates Sec. 8(b)(1)(A) by failing or refusing to process even a nonmeritorious grievance, if it does so for arbitrary or capricious reasons rather than because of the grievance's lack of merit. In that event, however, the Board will not order the union to arbitrate the grievance. See *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292, 292–293 (1974), affd. sub nom. *Kesner v. NLRB*, 532 F.2d 1169 (7th Cir. 1976), cert. denied 429 U.S. 983, 1022 (1976). Thus, even if we were to find that the backpay grievance was without merit (which, as we explain below, we do not), we still would find the 8(b)(1)(A) violation.

[17] Although the Coast Guard's letters were in response to the Employer's purported termination of Hanrahan, an arbitrator could find that those opinions also applied to his layoff.

[18] As the Supreme Court held in *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-583 (1960), arbitration should be ordered ''unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.''

placed before the Coast Guard itself, which is the only entity that can give Hanrahan the relief he truly seeks—full registration. We therefore find that no purpose would be served by ordering the Union to process that grievance.[19]

We also reject the judge's recommendation that, because of its conflict of interest, the Union should cede to the International Union its authority to appoint a representative to the arbitral panel. We find this provision unnecessary. Thus, we modify the judge's recommended Order to require the Employer to cease allowing the registered pilot shareholders, who are managerial employees and not properly part of the bargaining unit, to occupy positions in the Union, to participate in any union election conducted by, for, or on behalf of the Union, including ratification of any collective-bargaining agreement covering employees in the unit, or otherwise to interfere with the administration of the Union. See, e.g., *St. Joseph's Hospital*, 254 NLRB 634 (1981). This provision will prevent the registered pilots from participating in such unit-based activities as selecting a representative for the arbitral panel.[20] There will then be no impediment to the Union's selecting an unbiased representative for the arbitral panel.[21]

The General Counsel has excepted to the judge's failure to include a provisional make-whole order as part of his recommended remedy for the Union's failure to process Hanrahan's grievances. We find no merit to that exception.

As we have noted, when a union has violated its duty of fair representation by arbitrarily failing or refusing to process an employee's grievance, the Board will order the union to process the grievance, if necessary to arbitration, provided it has not been shown to lack merit. If it proves impossible, for procedural or substantive reasons, to process the grievance, the union is ordered to make the employee whole for any loss of pay he may have incurred because of the union's failure or refusal to act.[22]

In the circumstances presented here, we find no need for such a provisional make-whole remedy. Neither collective-bargaining agreement in evidence contains a timeliness requirement for filing and processing grievances. Nor do there appear to be any other impediments to the Union's taking Hanrahan's backpay grievance through the grievance/arbitation process. It would seem, then, that Hanrahan's grievance can be resolved on its merits, and that if he is owed any compensation for lost wages or other benefits arising from his layoff, the Employer will make him whole. Accordingly, we find no need to impose a provisional make-whole order on the Union.

4. Charging Party Hanrahan has excepted to the judge's failure to find him to be an independent contractor rather than a statutory employee.[23] Hanrahan argues that he provided pilotage service alone, pursuant to compulsory pilotage statutes and regulations, and that under Supreme Court authority,[24] he was an independent contractor, not an employee. Consequently, according to Hanrahan, the issues in this case are admiralty torts under the jurisdiction of the Federal district courts, rather than of the Board.

We find no merit to this exception. Hanrahan's employee status was implicitly taken for granted by all concerned until he raised the issue in exceptions. Hanrahan did not address the matter in his brief to the judge. Accordingly, we find that the matter has not been fully and fairly litigated, and therefore that it is not properly before us.

In any event, we are not persuaded that *applicant* pilots like Hanrahan are independent contractors within the meaning of the Act. In determining whether individuals are employees or independent contractors, the Board applies a ''right of control'' test. Under this analysis,

> [w]here the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor.

Air Transit, 271 NLRB 1108, 1110 (1984) (quoting *News Syndicate Co.*, 164 NLRB 422, 423–424 (1967)). Whatever the case may be with regard to registered pilots, it is clear from the record that the Employer does exercise control over the manner in which applicant pi-

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[19] Member Truesdale would find that Hanrahan's registration grievance remains arbitrable notwithstanding Hanrahan's resort to the Coast Guard after his union violated his statutory rights. Thus, the grievance, which claims that the Employer wrongfully failed to *recommend* Hanrahan for full registration, was arbitrable when filed and there is no showing that an arbitrator could not now direct the Employer to make such a recommendation if the grievance were found meritorious or that such a recommendation would be ineffectual. Accordingly, Member Truesdale would also require the parties to arbitrate this grievance.

[20] We therefore also find unnecessary the provision of the judge's recommended Order requiring the Union to cease allowing the registered pilot shareholders to be members of the Union.

[21] Because we have found this provision of the judge's order to be unnecessary, we do not decide whether it is actually improper, as the Respondents have argued in their exceptions.

[22] *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988). Chairman Gould questions the validity of the holding of *Mack-Wayne*, but finds it unnecessary to reach that issue here.

In agreeing with her colleagues that a make-whole remedy is not appropriate in this case, Member Browning expresses no view on whether *Mack-Wayne* was correctly decided.

[23] We are at a loss to understand why Hanrahan would make this argument. Were we to agree with it, Hanrahan would lose the protection of the Act.

[24] Hanrahan cites *Bisso v. Inland Waterways*, 349 U.S. 85 (1955), and *Guy v. Donald*, 203 U.S. 399 (1906).

lots perform their pilotage functions while they are undergoing training. Employer President Green testified that the Employer's screening committee, composed of three senior pilots, oversees the applicant pilots, lays out a rough program of what is expected, and receives reports from other pilots who have ridden with the applicants, concerning their performance. Green also testified that applicant pilots do not work by themselves at first; rather, they begin by mastering the easier areas of piloting and gradually advance to more difficult jobs as they acquire greater expertise and are approved by more experienced pilots. Several witnesses testified that registered pilots ride with applicant pilots and watch their performance. At the end of 3 years of training, the screening committee makes its recommendation to the Lakes Pilots membership, which then decide whether to recommend to the Coast Guard that the applicant receive full registration. Until an applicant has successfully completed the required number of trips, observed by more senior pilots, in the various waterways served by the Employer, he is not recommended for full registration.[25] As an applicant pilot, then, Hanrahan remained under the observation of the registered pilots and the screening committee for the duration of his training.[26] On this record, we find that the Employer did not exercise control only over the results of Hanrahan's pilotage service, but instead that it also retained the right to control the manner in which he performed those services. Accordingly, the record does not support a finding that he was an independent contractor, under the Board's right of control test, during the relevant time period.[27]

ORDER

A. The National Labor Relations Board orders that the Respondent, Lakes Pilots Association, Inc., Port Huron, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Permitting registered pilot shareholders, including those in direct managerial positions and those who vote as shareholders in matters affecting the bargaining unit, to occupy positions in Interlakes Pilots Association, District No. 2, Local 1921, International Longshoremen's Association, AFL–CIO (the Union), to participate in any union election conducted by, for, or on behalf of the Union, including ratification of any collective-bargaining agreement covering employees in the unit, or otherwise to interfere with the administration of the Union.

(b) Giving effect to and enforcing the collective-bargaining agreement between it and the Union to the extent it applies to registered pilot shareholders.

(c) Providing free office space and telephone service to the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Mail to each of its employees included in the bargaining unit, by registered mail, and post at its facility at Port Huron, Michigan, copies of the attached notice marked ''Appendix A.''[28] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be mailed to each of the Respondent's unit employees by registered mail and posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, Interlakes Pilots Association, District No. 2, Local 1921, International Longshoremen's Association, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in effect and enforcing any collective-bargaining agreement with Lakes Pilots Association, Inc. (the Employer) covering the Employer's employees, which requires membership in the Union as a

[25] As the judge found, Hanrahan's alleged failure to make the required trips on the Maumee River was one reason the screening committee recommended that he not be considered for registration by the Coast Guard.

[26] We have no doubt that Hanrahan was unaccompanied by more senior pilots on many trips, as he contends. That is not inconsistent with Green's testimony that applicant pilots are given increased responsibility, in stages, as they acquire experience. The fact remains, however, that Hanrahan remained subject to the screening committee's oversight and to the requirement that the senior pilots observe his proficiency in performing pilotage services on the various individual watercourses.

[27] The decisions cited by Hanrahan do not appear to have concerned the status of individuals like Hanrahan, who were in training to become full-fledged pilots.

Hanrahan has moved to supplement the record, to include three letters—one from the Labor Department, one from the Internal Revenue Service, and one from the Commerce Department's Great Lakes Pilotage Administration—concerning the status of registered pilots as independent contractors. We deny the motion, because the independent contractor issue has not been fully and fairly litigated and because the letters do not appear to address the status of applicant pilots such as Hanrahan, and thus are of scant, if any, relevance in this proceeding.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

condition of employment, to the extent it includes under its coverage registered pilot shareholders in the Employer.

(b) Failing and refusing to process, to arbitration if necessary, the grievance filed by Charging Party William Hanrahan over backpay or other benefits lost by virtue of being terminated or laid off by the Employer for the 1991 shipping season.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) On request of Charging Party Hanrahan, process, to arbitration if necessary, his grievance over backpay and other benefits lost by virtue of his being terminated or laid off by the Employer for the 1991 shipping season.

(b) Send by registered mail to each of its members and each member of the bargaining unit, and post at its office in Port Huron, Michigan, copies of the attached notice marked ''Appendix B.''[29] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be sent by registered mail to each of the Respondent's members and each member of the bargaining unit, and posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT permit registered pilot shareholders, including those in direct managerial positions and those who vote as shareholders in matters affecting the bargaining unit, to occupy positions in Interlakes Pilots Association, District No. 2, Local 1921, International Longshoremen's Association, AFL–CIO (the Union), to participate in any union election conducted by, for, or on behalf of the Union, including ratification of any collective-bargaining agreement covering employees in the unit, or otherwise to interfere with the administration of the Union.

WE WILL NOT give effect to and enforce the collective-bargaining agreement between us and the Union to the extent it applies to registered pilot shareholders.

WE WILL NOT provide free office space and telephone service to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LAKES PILOTS ASSOCIATION, INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in effect and enforce any collective-bargaining agreement with Lakes Pilots Association, Inc. (the Employer) covering the Employer's employees, which requires membership in the Union as a condition of employment, to the extent it includes under its coverage registered pilot shareholders in the Employer.

WE WILL NOT fail and refuse to process, to arbitration if necessary, the grievance filed by William Hanrahan over backpay or other benefits lost by virtue of his being terminated or laid off by the Employer for the 1991 shipping season.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, at Hanrahan's request, process, to arbitration if necessary, his grievance over backpay and other benefits lost by virtue of his being terminated or laid off by the Employer for the 1991 shipping season.

INTERLAKES PILOTS ASSOCIATION, DISTRICT NO. 2, LOCAL 1921, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL–CIO

John Ciaramitaro, Esq., for the General Counsel.
Robert M. Vercruysse, Esq., Lynne E. Deitch, Esq., C. Patrick O'Sullivan, Esq., and *Jeffrey M. Wilke, Esq.*, of Detroit, Michigan, for the Respondent Employer.
J. Douglas Korney, Esq. and *Anthony Houle, Esq.*, of Bingham Farms, Michigan, for the Respondent Union.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

William B. Hanrahan, pro se, of Fort Tratiot, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This proceeding is based on an order consolidating cases, consolidated amended complaint and notice of hearing (complaint) issued on July 10, 1992, by the then Acting Regional Director for Region 7. This complaint was based on charges brought by William B. Hanrahan (Charging Party), on March 9, 1992 in Case 7–CA–33014 against Lakes Pilots Association, Inc. (Respondent Employer or Respondent Association), and on August 7, 1991, in Case 7–CB–8840 and on February 20, 1992, in Case 7–CB–9105 against Interlakes Pilots Association, District No. 2, Local 1921, International Longshoremen's Association, AFL–CIO (Respondent Union).[1] The complaint alleges, inter alia, that Respondent Employer has engaged in activity in violation of Section 8(a)(1), (2), and (3) of the Act, and that Respondent Union has engaged in activity in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. Respondents deny the commission of any of the violations alleged in the complaint.

Hearing was held in these matters in Port Huron, Michigan, on February 1 through 4, 1993. Briefs were received from all parties on or about the first week of April 1993.[2] Based on the entire record and on my observation of the demeanor of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer at times material to this decision has been engaged in providing pilotage services for oceangoing freight vessels while these vessels ply the waters of the St. Lawrence Seaway and the Great Lakes. Respondent Employer has admitted the jurisdictional allegations of the complaint and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.[3]

[1] Charging Party filed an earlier charge against the Respondent Employer on April 30, 1991, in Case 7–CA–31833. This charge was dismissed by the Region, and the dismissal upheld on appeal by the Charging Party. Respondent Employer contends that because of this dismissal, the charge in Case 7–CA–33014 is time-barred under Sec. 10(b) of the National Labor Relations Act (the Act). This contention is discussed and ruled on at pp. 22–23 of this decision.

[2] The parties have sought in a number of pleadings filed subsequent to the hearing to supplement the record with various items of purported evidence. I do not believe the record needs such supplementation and reject each of the proffered items as unnecessary, not subject to cross-examination, and not worth reopening the record to consider.

[3] Respondent Employer does not contend that the Charging Party is not an employee entitled to the protection of the Act. This contention was made and dismissed in a recent case involving an almost identical employer. See *Upper Great Lakes Pilots*, 311 NLRB 131 (1993). Under almost identical facts with respect to the organization of the Respondent employer and its operation, the Board asserted jurisdiction.

II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint alleges that the Association and the Union violated the Act as follows:

1. (a) Respondent Association is a corporation whose shares are held exclusively by registered pilots who have an active management role in the operation of the corporation.

(b) Respondent Union also represents the above-described pilot shareholders as part of the unit, which includes persons other than registered pilot shareholders. These same registered pilot shareholders regularly serve as Respondent Union's officers and as Respondent Association's officers and exercise authority over the employment status of the nonshareholder unit employees.

(c) Because of the role registered pilot shareholders play in the management of Respondent Association, they are managerial employees and are, therefore, excluded from the coverage of the Act and are not appropriately a part of the unit.

(d) In view of the conduct set forth above, Respondent Association has interfered with the administration of, and rendered unlawful assistance to, Respondent Union.

2. The relationship between Respondent Association and Respondent Union has resulted in a disabling conflict of interest which has interfered with Respondent Union's ability to represent nonmanagerial Unit employees.

3. (a) Since on or about March 1991 and continuing to date, by virtue of the relationship described above, Respondent Union has breached its duty of fair representation in its handling of grievances concerning Respondent Association's failure to recommend the Charging Party for registered pilot status and Respondent Association's decision to layoff and/or terminate the Charging Party.

(b) Since on or about October 1, 1991, and continuing through March 31, 1992, Respondent Union refused to represent the Charging Party or process his grievances because he was delinquent in his dues.[4]

4. By being parties to and by maintaining in effect and enforcing a collective-bargaining agreement which, among other things, requires the employees covered thereby as a condition of employment to become and to remain members of Respondent Union, despite the disabling conflict of interest as described above, Respondent Association has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act and Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and 8(b)(2) of the Act.

5. By the conduct described above, Respondent Association has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

6. By the conduct described above, Respondent Association has interfered with the administration of, and has ren-

[4] I can find no evidence that the Union failed to properly represent the Charging Party for the reason that he was delinquent in his dues. It did fail or refuse to properly represent him, however, for reasons unlawful under the Act.

dered unlawful assistance and support to a labor organization in violation of Section 8(a)(1) and (2) of the Act.

7. By the conduct described above, Respondent Association has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby encouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

8. By the conduct described above, Respondent Union has been attempting to cause and causing an Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act.

A. *Does the Relationship Between the Association and the Union Create a Disabling Conflict of Interest and Are the Union's Members Who Own Stock in the Association Managerial Employees Not Appropriately Part of the Involved Unit?*

1. The organization of the Association and the Union

The Respondent Association is a corporation formed pursuant to the Great Lakes Pilotage Act of 1960, as amended (46 U.S.C.A. Sec. 9301). This legislation established standards and procedures for use of pilots in ship navigation in the Great Lakes and the rivers and other navigable waters flowing from these Lakes. The Act gives the U.S. Coast Guard the responsibility for overseeing Great Lakes Pilotage, including licensing or registering competent pilots, setting rates for pilotage and providing for making arrangements with Canada for equitable participation in setting pilotage policy and division of pilotage work. The Coast Guard has divided the Great Lakes into three described districts and has authorized the formation of an association of registered pilots in each. The Respondent Association is the privately owned business which forms the official pool of pilots for District 2, which generally is the navigable area of the Great Lakes from Port Colburn, Ontario, near Buffalo, New York, to Bouys 11 and 12, just above Port Huron, Michigan, and all rivers entering this specified area of the Great Lakes.

Respondent Association is composed of the registered pilots, applicant pilots and pilot boat employees of the Association.[5] An applicant pilot is one who is in training to become a registered pilot. This process takes about 3 years and is governed by U.S. Coast Guard regulations. All stock in the corporation is owned by the registered pilots in the involved Association, and all but one of the active registered pilots own stock. The amount of stock ownership varies among the various pilots and thus some pilots have more votes in shareholders' meetings than others. Applicant pilots and the pilot boat employees are not allowed to own stock. As of April 1990, there were 18 pilots on the Association seniority list, all of which were registered pilots, except the Charging Party, who was an applicant pilot. At the beginning of 1990, the officers of the Association were: Daniel Coleman, president/director; Milton Waldrop, vice president/director; Thomas Leinweber, second vice president/director; Daniel Meyers, treasurer; and Robert Greene, director. In August 1990, Coleman resigned and was replaced by Greene. Greene's director position was filled by Paul Singler on December 18, 1990. As of April 1991, there were 15 registered pilots in the Association of which 14 owned stock. The ownership of stock in the Association was as follows: Robert Greene (10 shares), Thomas Leinweber (10 shares), Victor Anderson (10 shares), Francis Kanaby (10 shares), James Ray (10 shares), Thomas Schnell (10 shares), William Yockey (10 shares), Milton Waldrop (10 shares), Philip Knetchel (10 shares), Daniel Meyers (10 shares), Bradley Ell (4 shares), Glen Pahel (4 shares), Paul Singler (6) shares, and William Coppola (4 shares).[6]

The Union was chartered in or about 1965 and became affiliated with the International Longshoremen's Association as a separate Local.[7] The Union and the Association have entered into a series of collective-bargaining agreements, the two most recent agreements were effective from April 4, 1990, to April 1, 1991, and April 2, 1991, to April 1, 1993, respectively. The agreements have a union-security clause and all registered pilots and applicant pilots are required to be union members. Applicant pilots are probationary members until they achieve registration. Pilot boat employees of the Association may become members but are not allowed to occupy union office and as a matter of course are not invited to nor do they attend union meetings.

The involved collective-bargaining agreements indicate that their provisions are not to be in conflict with the Code of Federal Regulations provisions dealing with piloting. In the exercise of its representative function the Union is governed by a constitution and bylaws. The Union's constitution and bylaws set forth the union officer positions and their duties. The president presides at all meetings of the Union and its executive board (consisting of all of its officers). The president also countersigns all checks, appoints persons to, and is an ex-officio member of all committees. The president appoints all stewards and represents the Union in all matters. The Union's vice president acts for the president in his absence or disability. The secretary-treasurer keeps meeting minutes, receives and deposits all moneys received by the Union, and is authorized by the executive board to sign checks. The trustees acts as an auditing committee. The constitution and bylaws in article VI indicates that only 2-year members are eligible to run for union office and only members may vote for union office, i.e., U.S. registered pilots. It also provides for a 15-day notice for nominations and elections to union office. Article VII provides that the Union's executive board exercises all disciplinary powers, fills officer vacancies, supervises union affairs, and authorizes the expenditure of funds. Article IX provides that nonpilots are only admitted to special membership with limited membership rights, are not permitted to vote on pilotage matters and may not hold union office. Article XI provides that the executive board serves as a bargaining committee and formulates collective-bargaining demands.

[5] The Association employs three pilot boat captains and three deckhands, who operate two pilot boats. The function of these employees is to ferry pilots between shore and the vessels they pilot.

[6] The information with regard to the ownership of the shares of the Association was received at my request after the record in this case closed. It was submitted in the form of an affidavit from the Respondent Association and is made a part of this record as Judges Exh. 1.

[7] The unit of employees represented by the Union is as follows: All pilots and pilot boat (auxiliary) personnel employed by the Association, excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

At the beginning of 1990, Victor Anderson was president of the Union. During that year, he resigned and was temporarily replaced by Glen Pahel. In December 1990, Francis Kanaby, a director of the Association for several years until 1989, was made president of the Union, replacing Pahel. This change occurred at the biannual meeting of the Union, held at the same time as a special board of directors meeting of the Association. The Association's minutes of its board meeting reflect that Anderson and Pahel attended the meeting and represented the Union. The minutes of the union meeting reflect that Greene, president of the Association, moved to forego the notice requirements of the Union's bylaws relating to nominating union officers in that less than the required 15-day notice of elections had been given. This was passed. Greene then nominated Francis Kanaby to be union president. Newly elected Association board member Paul Singler nominated Thomas Schnell to be union vice president, and Victor Anderson nominated William Coppola to be union secretary/treasurer. These nominations were elected by acclamation.

The Association provides the Union office space and telephone services without charge in the Association's office building.[8]

B. *Are the Registered Pilot Shareholders Managerial Employees Excluded from the Coverage of the Act, as Alleged in the Consolidated Complaint?*

In the recent case of *Upper Great Lakes Pilots*, 311 NLRB 131 (1993), the Board dealt with an Association of Great Lakes pilots and their union which are organized and operate under circumstances very similar to the Association and Union involved in this proceeding. In deciding that certain of the pilot shareholders were not unprotected managerial employees, the Board stated at 132:

> He [the judge] found that no pilot held an amount of stock sufficient to divest him of employee status,[6] that the corporate bylaws permit an entrenched board of directors and effectively deny nonmanagement shareholders the power to amend the bylaws.
>
> We agree with the judge's conclusion, but not with all of his underlying analysis. Although no single pilot owned enough stock to determine the Respondent's corporate policy, that fact alone does not end the inquiry. The pilots *as a group* owned *all* the Respondent's voting stock; thus, *as a group*, they could effectively determine corporate policy. As the Respondent points out, the Board in a number of representation cases has excluded, from bargaining units of other employees, shareholder-employees whose collective holdings of their employer's stock, gave them an effective voice in formulating and determining policy.[7] As the Board specifically noted in *Brookings Plywood*, where a large number of employees own a large portion of their employer's stock, they may collectively influence management policies even though no one of them would be likely to affect the making of corporate policy by himself.[8] The judge's reliance on *Airport Distributors* therefore is misplaced, because the employee in question in that case (a 10-percent stockholder) apparently was the *only* employee who owned shares of the employer's stock.
>
> We find, however, that the judge reached the correct result here. The Respondent's directors and officers during the relevant time period together owned more than half of the voting stock. The rest of the pilots, even acting in concert, could not outvote the officers and directors. On the basis of their stock ownership, then, the minority shareholders lacked an effective voice in the formulation and determination of corporate policy. The record contains no evidence that those individuals effectively determined the Respondent's policies, or that they could have replaced the officers or directors in order to gain control of corporate decision-making.[9] It is well settled that stock ownership alone does not deprive an employee from the protection of the Act,[10] and we agree with the judge that the pilots' job functions are not those of managerial employees. We therefore find that the pilots who were not officers or directors of the Respondent were not unprotected managerial employees, and that they were entitled to the protection of the Act.[11]

[6] The judge cited *Airport Distributors*, 280 NLRB 1144, 1150 (1986).

[7] *Sida of Hawaii, Inc.*, 191 NLRB 194, 195 (1971); *Red & White Airway Cab Co.*, 123 NLRB 83, 85 (1959); *Brookings Plywood*, supra, 98 NLRB at 798–799. In excluding the shareholder-employees, the Board relied in part on the fact that those individuals enjoyed preferential treatment over other employees, or otherwise had divergent interests. Although the Board in those cases simply excluded the shareholder-employees from units with other employees, and did not squarely hold that they were unprotected managerial employees, that seems to have been the Board's underlying rationale. See *Florence Volunteer Fire Department*, 265 NLRB 955, 956 (1982). See also the Supreme Court's discussion of the Board's evolving treatment of managerial employees in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275–289 (1974). But see *Everett Plywood & Door Corp.*, 105 NLRB 17, 19 (1953), in which the Board expressly found that stockholder-employees were protected by Sec. 7, even though they collectively held more than 75 percent of the employer's stock, where (like the pilots) *all* employees were stockholders. In that case, the Board followed its consistent practice and excluded from the bargaining unit employee-shareholders who were directors of the corporation. Id. at 19–20.

[8] 98 NLRB at 798.

[9] See, e.g., *S-B Printers*, 227 NLRB 1274, 1275 (1977).

The Board has excluded groups of shareholder-employees from bargaining units, even though they collectively owned less than half of the employer's stock. *Brookings Plywood*, supra; *Union Furniture Co.*, 67 NLRB 1307 (1946). In neither case, however, was the situation now before us presented; i.e., there was no showing that the corporate officers and directors collectively owned a controlling block of stock.

Florence Volunteer Fire Department, supra, cited by Respondent, is unlike this case. In *Florence*, each of the firefighters had an equal voice in management decisions, and no policy could be set or implemented without ratification by vote of the membership. Those circumstance do not exist here.''

[10] *Airport Distributors*, supra, 280 NLRB at 1150.

[11] A fortiori, pilots Aho, Ojard, and Soderquist, who had not yet purchased stock, were protected employees.

[8] Though not alleged in the complaint, I find this assistance by the Association to the Union to be in violation of Sec. 8(a)(2) of the Act. *Upper Great Lakes Pilots*, supra.

The Board's holding in *Upper Great Lakes Pilots, Inc.* was made in the context of deciding whether certain pilot-shareholders were entitled to the protection of the Act as alleged discriminatees. In the instant case, the question is whether the stockholder status of the pilots makes them management employees, properly excluded from the involved

unit, and creates a disabling conflict of interest when participating in union activities. Although the organization of the Respondent employers in the two cases is very similar, there are significant differences. In the instant case, the members of the Board do not hold a majority of the shares of the Association. Based on the stockholdings in effect in April 1991, it would be virtually impossible for a board to be elected that did control a majority of the shares. Thus, as stated by the Board in *Upper Great Lakes Pilots, Inc*., ''The pilots as a group owned all the Respondent's voting stock; thus, as a group, they could effectively determine corporate policy.''

Additionally, this case differs from *Upper Great Lakes Pilots, Inc.* as the unit includes six pilot boat employees who can never be shareholders, one applicant pilot who is precluded from being a shareholder until he becomes a registered pilot and one registered pilot who is not a shareholder by choice. Shareholders, as registered pilots, hold a preferential position over the applicant pilot and pilot boat employees and receive preferential treatment in comparison. For example, they may vote in shareholder meetings and may hold office and they receive substantially higher pay. Their interests are divergent interests from nonshareholders in that it is to their interest to keep the pay and benefits of nonshareholder's as low as possible to increase the pool of money to be split between the shareholders each year.

Based on the evidence of record, shareholders who are not members of the Association board of directors do not participate in making day-to-day management decisions or policy, except for the function of electing directors. They do have the power to elect new board members, as opposed to the situation in *Upper Great Lakes Pilots, Inc.* Thus, they may change existing policies by electing new members of the board.

I find these differences to be significant and call for a different result than that reached in *Upper Great Lakes Pilots*. The shareholders, none of whom as a group can be classified as minority shareholders, have an effective voice in the formulation of corporate policy, at the very least by their ability to elect new board members. This voice is wholly absent from the pilot boat employees and the applicant pilot employee. The shareholder registered pilots have a homogeneity of interest which is not shared with the applicant pilot and pilot boat employees. They also have sufficient numbers to control the operation of the Union and obviously do, not even allowing the nonregistered pilots a vote in union affairs. Respondent Association on brief argues that the case of *Science Applications International Corp.*, 309 NLRB 373 (1992), calls for a finding that the shareholder employees should not be considered management employees. I do not agree. In *Science Applications*, the stockholder employees stock holdings accounted for less than 1 percent of the shares of the involved employer. They clearly could not effectively control or influence corporate policy. Nor did they enjoy preferential treatment from nonstockholder employees as is the case in this proceeding. These differences make *Science Applications* significantly distinguishable from the instant case.

For the reasons set forth above, I find the shareholder-employee members of the Union to be management employees properly excluded from the Union. Because of their domination of the Union, which also has as members nonshareholder employees of the Association, I find the Association has violated Section 8(a)(1), (2), and (3) of the Act and the Union has violated Section 8(b)(2) of the Act, as alleged in the complaint.

C. *Does There Exist a Disabling Conflict of Interest Which Precludes the Union from Effectively Representing Nonshareholder Members?*

I also find that the structure of the Union, having as it does only registered pilots and shareholders in the Association as voting members, precludes the Union from effectively representing the nonshareholder employees. A union must be able to approach negotiations with the single-minded purpose of protecting and advocating the interest of employees. *Child Day Care Center*, 252 NLRB 1177 (1980); *Teamsters Local 688 Insurance & Welfare Fund*, 298 NLRB 1085 (1990). The Board has stated that, if ''a union has allegiances which conflict with that purpose, we do not believe that it can be a proper representative of employees.'' *Oregon Teamsters Security Plan Office*, 119 NLRB 207 (1957). It has also held that:

> To establish such a disabling conflict of interests, it is quite clear from the cases that the union or the employer need not have effective domination or control over the other, but merely that there exist the potential of a conflict or a ''proximate danger of infection of the bargaining process.''

Medical Foundation of Bellaire, 193 NLRB 62 (1971); *St. Louis Labor Health Institute*, 230 NLRB 180 (1977).

A union having a disabling conflict of interest, which continues to represent the employee unit and is a party to a collective-bargaining agreement with a union-security clause, violates Section 8(b)(1)(A) and Section 8(b)(2) of the Act. *Teamsters Local 688 Insurance & Welfare Fund*, supra. The employer that continues to recognize and bargain with such a union and maintains in effect a collective-bargaining agreement with a union-security clause violates Section 8(a)(1), (2), and (3) of the Act. *Teamsters Local 688 Insurance & Welfare Fund*, supra.

In the instant case, the close relationship among the pilots who run the Employer's operation and the pilots who occupy positions in the union leadership disables the Union from fulfilling its role of protecting and advocating the interest of employees, especially the nonshareholder employees. Collective-bargaining agreements are negotiated between the officers of the Association and the officers of the Union, all of whom are registered pilot shareholders in the Association. The nonshareholder employees are not allowed to vote on such negotiated agreements. Union officers sit in at board of directors meetings and as the minutes of such meetings reflect, are ''consulted'' with respect to actions taken. For example, the minutes of the December 18, 1990 board of directors meeting reflect that Union was consulted and was agreeable to adverse action taken by the board with respect to Charging Party Hanrahan. The Union's President Kanaby, who until the year before his nomination as union president, was a member of the Association's board of directors for several years. He was nominated by the Association's president, who also put him on the Association's screening committee temporarily for the purpose of deciding Charging Party Hanrahan's fitness to become a registered pilot.

In short, for the reasons set forth above, the Union suffers from a disabling conflict of interests and cannot fulfill its legal obligations as bargaining representative of its nonpilot members. Its continuing representation of the unit and enforcement of its contract with its union-security clause violates Section 8(b)(1)(A) and (2) of the Act. Likewise, the Association's continuing recognition of the Union and maintaining the existing contract would also be violative of Section 8(a)(1), (2), and (3) of the Act.

D. *Did the Association and/or the Union Violate the Act in Treatment of Charging Party William Hanrahan?*

The basis for this proceeding lies in the treatment of the Charging Party by the Association and subsequent problems he encountered in seeking representation by the Union. Charging Party Hanrahan was discharged, reinstated, laid off, discharged again, reinstated (under order of the Coast Guard) and he was denied the Association's requisite recommendation to move from applicant pilot status to U.S. registered pilot status. At the core of this case is the representation afforded Hanrahan by the Union in response to these acts of the Association, and the relationship between the Association and the Union, which General Counsel contends fatally taints the actions of both.

1. The Association refuses to recommend Hanrahan for registration as a U.S. registered pilot and terminates/permanently lays him off

Hanrahan first was associated with Lakes Pilots in October 1987 during his vacation from another employer. He worked 14 days as an applicant pilot trainee. In this capacity he observed a licensed pilot perform his duties. The pilot, who is licensed by the U.S. Coast Guard, controls oceangoing vessels in the area of the Great Lakes for which he is licensed which corresponds to the District established by the Coast Guard, in the instant case, District 2. After the 14-day trial period, Hanrahan returned to his then employer, Inland Lakes Management Corporation where he was employed as a pilot for lake vessels for 11 years. This pilotage was performed under a license issued by the Coast Guard, but which does not authorize pilotage of oceangoing vessels.

In April 1988, Hanrahan became employed by Lakes Pilots as an applicant pilot. In this capacity, he was issued an ''Applicant Pilot Card'' by the Coast Guard. Under Coast Guard rules, a person desiring to become a U.S. registered pilot, the status of the other pilots in the Association, must undergo three shipping seasons of training by the Association and then be recommended for registration. Hanrahan was hired by Daniel Coleman, then president of Lakes Pilots. Coleman told him at his time of hire of the 3-year progression to achieve his registration. According to Hanrahan's understanding, his training would be the responsibility of the Association's ''screening committee,'' which is composed of the three most senior pilots in the Association. His first season was the 1988 shipping season.[9] He thereafter worked full time as an applicant pilot for the Association during the shipping seasons of 1989, 1990, and 1992.[10] In the performance of his job, he would be dispatched by an Association dispatcher to a particular ship. Hanrahan would go to the ship's location and pilot it to destination or to a point where another pilot from another association would relieve him. He would then stand by for another dispatch. As Hanrahan gained experience, he would be dispatched to perform piloting duties alone in some cases, and in others, would be accompanied by a registered pilot from the Association, depending on the degree of difficulty involved in the piloting function.

After taking employment with Lakes Pilots, Hanrahan joined the Union. Pursuant to the collective-bargaining agreement between the Association and the Union, Hanrahan, as an applicant pilot was paid a daily rate for work performed, with pay being made every 2 weeks. His pay differed from that of registered pilots primarily in that his pay was only a percentage of the daily rate for registered pilots, 75 percent in his first year, 85 percent in the second year, and 95 percent in his third year. As only registered pilots may own stock in the Association, Hanrahan was not able to be a shareholder in the Association until he became a registered pilot. Although pilots who are employed by the Association are supposed to purchase stock in the Association upon becoming registered pilots, at least one of the Association's registered pilots had not bought stock. Notwithstanding this, this pilot was paid as if he were a shareholder.

On August 16, 1990, Hanrahan received notice he was to be laid off. Coleman told him he was to be laid off beginning in September 1990. No one questions that this layoff was motivated by declining business for the Association. It was proposed that the four least senior pilots, including Hanrahan, would be laid off, presumably permanently. The layoff of Hanrahan and the others was avoided when Coleman resigned and three other pilots either resigned or took voluntary layoff. As a result of these actions, Hanrahan was able to finish the 1990 shipping season, his third as an applicant pilot. As a result of Coleman's resignation, Robert Greene, a member of the Association's board and a member of its screening committee, was made president of the Association.

On December 18, 1990, the board of directors held a formal meeting and took up several matters, including making Paul Singler a director to fill the vacancy caused by Greene's ascension to president. They also took up the matter of Hanrahan. The minutes of this meeting, with respect to Hanrahan, recite:

> Captain Greene called on Captain Waldrop to submit the Screening Committee report concerning applicant pilot Captain William Hanrahan. Captain Waldrop reported that the Committee, consisting of Captains Anderson, Kanaby, Waldrop and Greene, recommended against registration of Captain Hanrahan. Following discussion of the report, on motion by Captain Waldrop, supported by Captain Meyers and passed, the recommendations of the Screening Committee was accepted. Following further discussion, it was determined that Captain Hanrahan be immediately laid-off indefinitely

[9] The shipping season for oceangoing vessels in the Great Lakes begins with the opening of the Saint Lawrence Seaway in about the last week of March and ends with the closing of the Seaway about December 20.

[10] Hanrahan was laid off for the 1991 shipping season, a layoff which is contended to be unlawful.

> and be advised that with the estimated return to duty of regular fully registered pilots for the 1991 shipping season, it would be unlikely he would be called back to work. It was reported that ILA 1921 had been consulted and was agreeable to this action concerning Captain Hanrahan.

At the beginning of December 1990, the screening committee consisted of Greene, Anderson, and Lienweber. Greene testified that because the president does not usually sit as a voting member of the screening committee, he considered that there was a vacancy on the committee. He also testified that Lienweber was in the hospital, creating a temporary vacancy. He therefore appointed Kanaby and Waldrop to fill these vacancies on a temporary basis. They were informed of their new roles just prior to their meeting on December 19, 1990.[11] Neither Waldrop nor Kanaby had been on the screening committee for at least 3 years prior to the December 19 meeting. For this reason, neither of these two men had been in charge of Hanrahan's training and they were not familiar with his competency except from limited personal observation.

The minutes of the screening committee meeting held on December 19, 1990, read as follows:

> President Robert J. Greene requested a meeting of the screening committee. The meeting took place on December 19, 1990 at 1730 hours at the Econolodge, 1800 Miami St., Toledo, Ohio. Present were Robert J. Greene, President, Victor Anderson, Chairman of the Screening Committee, Francis Kanaby, Temporary Member of the Screening Committee, and Milton Waldrop, Temporary Member of the Screening Committee. It is the recommendation of the screening committee that any consideration for registration of William Hanrahan be denied for the following reasons: l. He is not cleared for necessary trips for the Maumee River. 2. His anniversary date has not been reached. 3. Senior pilots will be returning from sick leave in the Spring of 1991, which will create over-staffing of pilots.

At the December 19, screening committee meeting, Kanaby had only been on the committee 1 day, having been appointed to it 2 days before by Greene. Kanaby had not sat in on any prior screening committee meetings. At the time of the meeting, Kanaby had never been with Hanrahan on a trip that traversed the Maumee River and had no independent knowledge of what Hanrahan's record on the Maumee might have been. However, he was opposed to recommending Hanrahan's registration. He said Anderson, who had also been a past president of the Union, told him that Hanrahan had not completed the required trips. Waldrop testified that Hanrahan had not taken command of the ships they had piloted jointly and he felt there was something wrong with this, and he could not recommend Hanrahan. This conflicts with Kanaby's version which said there was nothing more to the negative recommendation than appears in the minutes of the meeting. I credit Kanaby's version of what happened at the meeting and rely on the minutes of the meeting to accurately reflect the screening committee's motivation. Kanaby seemed genuinely surprised when he learned for the first time while testifying herein that the Association, through Greene, had taken the position with the Coast Guard that it questioned Hanrahan's competency to be a registered pilot. This attack on Hanrahan's competency seems to me to be nothing more than an attempt by the Association to shore up its decision to terminate Hanrahan. Evidence which will be discussed subsequently strongly indicates that the primary reason that Hanrahan was not recommended for registered pilot status was the Association's board's desire to lay off or terminate Hanrahan because of the worsening economic condition of the Association. There is some question whether the Coast Guard regulations may limit the ability of the Association to lay off or terminate registered pilots as opposed to applicant pilots. This question may have played a part in the decision of the screening committee not to recommend Hanrahan.

At the biannual membership meeting of the Union held on December 19, 1990, Captain Green, president of the Association moved to forego the notice requirements of the Union's bylaws relating to nominating union officers. This was passed. Green then nominated F. Kanaby to be union president, P. Singler nominated T. Schnell to be union vice president, and V. Anderson nominated W. Coppola to be union secretary/treasurer. These nominations were elected by acclamation.

Kanaby had not previously held union office, but had been on the Association's screening committee and its board of directors as late as the previous year. Prior to Singler's nomination to be vice president, he had been secretary treasurer of the Union. According to Hanrahan, Singler was either on or had been on the Association's board of directors immediately prior to his union office nomination. Anderson had been been president of the Union from December 1989 until he resigned. He was chairman of the screening committee at the same time.

On January 2, 1991, Waldrop warned Hanrahan that he might be discharged. Waldrop informed him that the screening committee had not recommended him for registration to the Coast Guard and he would likely be terminated before the 1991 shipping season. Following this warning, Hanrahan spoke with the chairman of the screening committee, Captain Anderson, who confirmed what Waldrop had said. According to Hanrahan's credible testimony, both men told him he was not being recommended for registration for the reasons given in the minutes of the screening committee meeting.

Hanrahan received a letter dated January 10, 1991 (G.C. Exh. 8) from Captain Greene which reads:

> This will confirm the information given you by telephone on Wednesday, January 2, 1991 by Captain Waldrop concerning the decisions of the directors as to your registration and lay-off.
>
> At their meeting on December 18, 1990, the Directors accepted the report of the screening committee and will not recommend you to the U.S. Department of Transportation for full registration as a pilot for District 2 of the Great Lakes.

[11] Curiously, the minutes of the screening committee noting the adverse recommendation regarding Hanrahan reflect that the meeting took place on December 19, a day after the director's minutes state that the recommendation of the screening committee was presented for action.

> Also at the December 18 directors meeting, the Directors confirmed the decision to lay you off indefinitely, effective at the conclusion of the 1990 season. At the same time, we wish to advise that if projections for the 1991 season hold, we would not recall you for duty when the 1991 season begins and if so, we would expect to terminate your employment with Lakes Pilots Association, Inc.
>
> During the lay-off period, your health care, group life insurance, and disability insurance would be continued.
>
> We regret having to make these decisions and ask you not to hesitate to call if you have any questions.''

Hanrahan received a letter dated February 22, 1991, from Greene (G.C. Exh. 9), which states:

> Further to our letter to you of January 10, 1991, the Directors have unanimously determined that we would not be recalling you for duty when the 1991 season begins and therefore, your employment with Lakes Pilots Association is terminated, effective Midnight, March 30, 1991.
>
> Separately, we will be notifying you of your rights under COBRA regarding coverage under the company's group health insurance plan with Michigan Blue Cross-Blue Shield.''

The complaint does not allege that the Association violated the Act by its actions in regard to terminating or laying off Hanrahan and refusing to recommend him for registration.[12] The evidence most strongly supports a finding that its decisions to terminate Hanrahan and not recommend him for registration were motivated by economic reasons and not by any union or other protected activity engaged in by Hanrahan. Hanrahan testified that he told the NLRB that he was terminated because the Association believed that he would not buy stock in the Association and would still demand full pay under the contract, that existing shareholders had an unexpected windfall coming to them as part owners of stock in another company that held valuable real estate and feared sharing the windfall with Hanrahan and because of personal animosity because of his friendship with a former president of the Union who was unpopular with some of the other pilots, and because he had complained about his work assignments, which he consider more onerous than those given to more senior pilots. I find that of the reasons Hanrahan believes he was terminated, only the matter of his friendship with a former union president and his complaints about his work schedule would be activities protected under the Act. The evidence of record does not support Hanrahan's contentions in these regards. I cannot find any substantial evidence that Hanrahan's friendship with the former president or his complaints played any part in the Association's decision to terminate him. The Association's declining business was documented and I find that it supports the Association's position that Hanrahan was terminated for economic reasons.

As its Exhibit 14, the Association placed in evidence a record of Billed Hours for the Association for the period 1988–1992. It shows:

Designated Hours	*Undesignated*	*Hours*	*Total Hours*
1988	9,590.67	9,739.32	19,329.99
1989	9,538.36	9,773.87	19,312.23
1990	6,840.63	7,226.45	14,067.08
1991	6,436.99	6,855.63	13,292.42
1992	6,579.76	6,722.22	13,301.98

Designated hours are the billed hours in waters ''designated'' by the Coast Guard as more difficult waters and undesignated hours are the billed hours in waters ''designated'' by the Coast Guard as less difficult. The fees charged for the two classes of hours are different. The exhibit clearly shows a substantial decline in business beginning in 1990 and continuing to date. The manner in which the Association chose to address this problem is clearly its decision. That it chose to layoff Hanrahan in response may be unfortunate, but it is certainly not contrary to either the pertinent collective-bargaining agreement or the National Labor Relations Act.

With respect to the proposed layoff of Hanrahan and three other Association pilots in August 1990, the motivation was declining business as reflected by Exhibit 14. No one argues that the August 1990 proposed layoff was motivated by anything but economic considerations.

2. Hanrahan files his first grievance with the Union

Hanrahan responded to this notice of his termination by filing a grievance with the Union. On March 18, 1991, he wrote to Union President Kanaby the following:

> Enclosed is a copy of a termination notice from the Board of Directors, Lake Pilots, Inc.
>
> While Lake Pilots, Inc. has the right to lay me off, I contend that *termination* is neither legal nor acceptable.
>
> Since this situation imposes a stigma on 17 years of professional commitment, my future employment prospects and my family's continued security, I am impelled to defend my credibility. I am prepared to protect my rights, before an Administrative Law Judge, if necessary, and look to Local 1921 for *representation.*
>
> As a dues paying member in good standing, you may consider this letter a formal request for legal pursuit of a *wrongful discharge* grievance.
>
> Please reply by certified mail so that all parties concerned are protected.

On the same date, Hanrahan also wrote Captain Greene the following letter:

> My decision to leave Inland Lakes Management, Inc. and join Lakes Pilots, Inc. was based on a candid con-

[12] Art. I(G) of the parties' collective-bargaining agreement states:

> The Company shall have the right to discipline any employee for cause, subject to the arbitration provision of this agreement.

Art. III(D)(2)(a) addresses the issue of layoffs and reads as follows:

> Applicant and temporarily registered pilots will be employed and laid off as needs warrant, as determined by the Board of Directors after consulting with the Union.

versation with then President, Daniel Colman. I stated that if I came to work at lake Pilots it would be a sincere, long-term commitment. Considering the high family stakes involved, I asked that Lake Pilots, Inc. make the same commitment in return. I then joined Lakes Pilots, Inc. of Port Huron, Michigan.

I purchased a home, moved my family and became part and parcel of the local community. I honored my commitment, and Mr. Coleman, representing Lakes Pilots, Inc., honored his.

In August of 1990, that changed.

Mr. Coleman resigned, as many others have since then.

I continued to service my commitment right up till the time the last vessel, the Federal Danube, cleared Lake Erie on December 16, 1990.

During my three year tenure as an applicant pilot, I have performed my duties in a safe, responsible, and ethical manner, worthy of any public, professional or official scrutiny.

I have absolutely, no apologies to make.

Now my credibility has been challenged and my family's future has been placed in jeopardy. To be terminated without cause if a completely unacceptable situation. I am now forced to defend my credibility and also protect my family's continued long-term security. This a most unfortunate situation.

On March 19, Hanrahan again wrote Greene, with a copy to the then U.S. Coast Guard Director of Pilotage, Captain Federic J. Grady. This letter sets out Hanrahan's understanding of the Code of Federal Regulations dealing with registration of Great Lakes pilots. Citing several of the regulations, Hanrahan takes the position that only the Coast Guard can terminate his status as an applicant pilot and that the Association lacks that power. He also asserts that he has completed all requirements for full registration and will petition the Coast Guard for an investigation.

On April 5, 1991, Hanrahan wrote again to Kanaby a letter outlining what he wanted from the grievance he requested be filed in his behalf. The letter states:

With reference to my wrongful discharge grievance dated March 18, 1991, please find below a list of remedies to this unfortunate situation.

l. Reinstatement as a fully registered pilot.

2. Back Pay with interest and pension payments.

A. All benefits to resume (medical, dental, pension, life insurance, license insurance) as a fully registered pilot.

3. All documented expenses that I have incurred to defend myself to include—

A. Secretarial services.

B. Outside legal fees.

C. Phone and administrative costs.

4. Letter of apology from the Board of Directors of Lakes Pilots Association, Inc.

Note: Items 5, 6 and 7 may be considered as separate grievances or additions and negotiated separately.

5. $500.00 plus interest—spring meeting expense payment.

6. $150.00 plus interest—one day's pay for December 17.

7. $4.00 plus interest—shortage of August, 1990 expense.''

The Union, through Kanaby, wrote Hanrahan on April 8, 1991, stating:

I have your letter requesting the Union assist you with regard to your discharge. The Executive Board of the union decided that a grievance would be filed on your behalf and a copy of the letter which was sent to Lakes Pilots Association, Inc. is enclosed herewith.

The Executive Board has agreed to provide you representation in accordance with the By-laws and Constitution.''

The letter to the Association to which Kanaby refers above reads:

Interlakes Pilots Local 1921, I.L.A., hereby files a grievance on behalf of Captain William B. Hanrahan for breach of the collective bargaining agreement for wrongfully discharging Captain Hanrahan as a pilot with Lakes pilots Association Inc. by letter dated March 18, 1991.

The Union demands that Captain Hanrahan be reinstated and that he be awarded any lost wages due him from the date of his termination.

Hanrahan received a letter from the Union dated April 12, 1991, which reads:

The Union has received a letter from Lakes Pilots Association, Inc. in response to our letter of April 8, 1991 regarding grievance for wrongful discharge. Enclosed please find a copy of said letter.

We feel that the grievance has been reviewed, acted upon and resolved by the signatory parties to the collective bargaining agreement.

The letter to which Kanaby refers is from the Association to the Union, dated April 10, 1991, and which reads:

We acknowledge receipt of your letter of April 8, 1991 presenting a grievance on behalf of Captain William B. Hanrahan.

We advise that effective at Midnight March 31, 1991, Lakes Pilots Association, Inc. proposes to rescind the termination of Captain Hanrahan and reinstate him as an applicant pilot.

However, his indefinite lay-off as set forth in our letter to him of January 10, 1991 (A copy of which is enclosed) will be continued. If the foregoing is agreeable, Captain Hanrahan's benefits will be continued without interruption and there would be no lost wages as a result of the termination. Please promptly advise if this proposal is acceptable so that we can notify Captain Hanrahan.

In making this proposal, Lakes Pilots Association, Inc. is not admitting that there is a basis for a grievance or a breach of the collective bargaining agreement and denies that Captain Hanrahan was wrongfully dis-

> charged as set forth in your letter and as claimed by him.

Hanrahan was not consulted by the Union before it accepted this proposed resolution of his grievance. Thus, on April 16, Hanrahan wrote the Union a letter stating:

> I acknowledge receipt of your April 12, 1991 letter and do accept reinstatement subject to the documented resumption of all prior established benefits.
>
> However, the issue of full registration is not resolved.
>
> As I stated in my letter to Mr. Greene dated March 19, 1991, I have completed all requirements for full registration as stated by Lakes Pilots Association, Inc. and all requirements for full registration as set forth in USCG, CFR, Title 46, Subpart (B) paragraphs 401.210 and 401.220—Registration of Pilots.
>
> I steadfastly maintain this position and will continue to pursue certification as a fully registered pilot. Should the Board of Directors of Lakes Pilots Association, Inc. at any time wish to reconsider their position, please contact me.''

On April 30, 1991, Hanrahan wrote the Union another letter which reads:

> With reference to my letter of April 16, 1991, acceptance of Lakes Pilots, Inc.'s proposal is contingent upon the documented resumption of all prior established benefits. Please advise Lakes Pilots, Inc. that documentation and a signed agreement from the Board of Directors is necessary for reinstatement. If there is any disagreement, please notify me promptly so that I may proceed accordingly.
>
> Separately, please send me a copy of the current bargaining agreement in effect with Lakes Pilots, Inc.

The Union has never responded to Hanrahan's requests regarding full registration even though subsequent evidence establishes that the Union recognized he was asking that the matter of registration be grieved.

Hanrahan again wrote to the Union of June 17, 1991, asking:

> With reference to my letter of April 30, 1991, I must assume there is no agreement with Lakes Pilots, Inc.; therefore, I am requesting this grievance go before an Arbitration Board to be decided. I shall expect a reply within fourteen days.[13]

Hanrahan testified that he never received any written confirmation that his termination was rescinded nor that his benefits had been reinstated. The evidence reflects that some of his benefits were in fact reinstated and one can presume that his termination was rescinded, though that act had no practical effect as his layoff continued in effect. The Union argues that it fairly represented Hanrahan and that it effectively handled his grievance, contending that all Hanrahan asked for was to have his termination rescinded. I disagree. The Union did accept and address Hanrahan's grievance with regard to his termination. I also find that Hanrahan did not ask that his layoff be grieved, at least to this point in time. The Union also correctly points out that the collective-bargaining agreement gives the Association the right to lay off applicant pilots at the board of directors' discretion.

However, the Union did not grieve the Association's refusal to recommend him for full registration. The Union takes the position that Hanrahan did not ask that it grieve this issue and further, that it is not grievable under the contract. I believe that this position is disingenuous. Review of the following correspondence supports this view.

Hanrahan did not receive a response to his June 17 letter. However, in late July 1991, he received a handwritten letter from Union Vice President Tom Schnell on union letterhead. This letter reads:

> Just a note or two. We finally just had a so-called ex. board meeting of this Local. Kanaby is a worthless piece of shit. I had not realized he has done nothing (so to speak) in regards to your situation. John Baker and the G. L. District are aware of this now, although it still must be initiated by us here at Local 1921.
>
> I'm going to put as much pressure on this guy (Kanaby) as I can. We've finally got a labor lawyer (Harold Ross), but haven't met with him yet. I advised Frank for him and I (plan) to meet with him soon (next week), but I continue to be baffled by Kanaby's action. I will assume this myself with the help of the executive board if I can at all possibly do it. Pahel is in agreement—besides myself, but confident observation will Brad Ell. Coppola—I hope to.
>
> I will do something this week. This has gone far enough. Your situation—Loftin all of it, I will tolerate just so much and then I fly—so—hand in there my friend. I know its difficult times for you, and in essence though I don't know what you are going through. I'm 100% in your corner.
>
> I may be leaving myself in the near future??? Not sure yet.

Clearly, Schnell was speaking to the matter of registration as the termination of Hanrahan had been rescinded. The Baker referred to in the letter is John Baker, vice president of the Great Lakes District of the I.L.A. Hanrahan wrote Baker on August 2, 1991, asking:

> Enclosed are copies of my wrongful discharge grievance and the purported resolve of this problem. I have requested that this grievance be resolved by an arbitration panel, per the collective bargaining agreement and have had no reply. I am now requesting that this situation be considered at the District level and resolved as the constitution and contract call for.

On August 23, 1991, Hanrahan received notice from the Association that he was again being terminated. This letter, from Greene, reads:

> As you are aware, you have been on indefinite layoff since the end of the 1990 season. The economic

[13] At the hearing Hanrahan volunteers that he no longer wants the matter of registration to go to arbitration because the Association could rig the results. I acknowledge Hanrahan's fears which I feel to be justified. However, the mechanics of selecting an arbitration can be adjusted to achieve a fair arbitration panel.

> conditions which prompted your lay-off have continued and are continuing this year despite fewer pilots available as a result of retirements and illness. Accordingly, at the directors meeting on August 23, 1991, it was decided to terminate your employment as an applicant pilot with Lakes Pilots Association, Inc. The termination will be effective at Midnight, August 31, 1991.[14]

Following this action, Kanaby received a letter from Baker discussing the grievances filed by Hanrahan. This letter, dated August 27, 1991, reads as follows:

> You have requested some guidance in your processing of the grievance of William B. Hanrahan. Without prejudging this matter on the merits, I would suggest the following:
>
> 1.) The grievance of Capt. Hanrahan under date of March 18, 1991 deals only with the termination of his employment by Lakes Pilots Association, Inc. In response to the grievance you processed, he was reinstated and then layed off. This ended the grievance.
>
> 2.) A separate question has been raised as to his failure to successfully complete his training. He asserts he has completed it. The minutes of the Board of Directors of Lakes Pilot's Association do indicate only that the Screening Committee recommended against registration of Captain Hanrahan. Although this question was not originally raised by Capt. Hanrahan, I see no reason to require a separate document in order to process this as a grievance.
>
> A Screening Committee should have latitude in recommending a pilot for registration. However, the committee cannot be arbitrary in discharging its function or refuse to recommend registration for reasons not related to his training or his abilities as a pilot. If it is a factual question of whether or not he completed the required number of trips or trained for the required number of months, this should be easily established. If the failure to recommend is based on his lack of skills this should be documented. In other words, the union should request some clarification from the Corporation as to why he was not recommended for registration by the Screening Committee and why the Corporation did not continue his training program in the 1991 season.
>
> If this information does not resolve the matter, then a request for arbitration may be appropriate. This question must be decided by your Executive Committee. I hope the foregoing will be of assistance to you.

I believe the letter from Waldrop to Hanrahan and the letter from Baker clearly shows that the Union was aware of Hanrahan's desire to grieve the matter of the Association's refusal to recommend him for registration. Similarly, it is clear that the International Union saw no problem with grieving over this issue. Yet, Kanaby never took any action with regard to this request, not even to the extent recommended by Baker. I believe that the reason nothing was done was the conflict of interest faced by Kanaby. He was part of the management decision-making process that decided against recommending Hanrahan and it was against his financial interest as a shareholder to have Hanrahan registered and perhaps then be forced to reemploy him.[15] I believe it is also the result of the Association's dominance of the Union. The Association's president, Greene, put Kanaby on the screening committee and virtually placed him as union president. The evidence reflects that the only time that Kanaby objected to any of Greene's actions with respect to Hanrahan was over Hanrahan's first discharge. Even that is suspicious because the testimony of Greene and Kanaby differ on whose idea the solution to this situation was and the solution arrived at by the two men kept Hanrahan off the payroll, just as would have been the effect of termination. Union Vice President Schnell notes in a letter to Union Secretary/Treasurer Pahel that Kanaby will not stand up to Greene and ascribes it to Kanaby's corporate allegiances.

3. Hanrahan's efforts on his own behalf with the Coast Guard

Not satisfied with the Union's efforts in his behalf, Hanrahan began pursuing what amounts to an appeal of the Association's actions with the U.S. Coast Guard. On April 28, 1991, Hanrahan had written Director Grady the following letter:

> Enclosed is a copy of the minutes of the December 18, 1990, District #2, Lake Pilots Association, Inc., Board of Directors Meeting. Highlighted is that portion of the meeting indicating rejection of my registration by the ad hoc screening committee. I was never contacted about the outcome of this meeting until January 10, 1991, a copy of which is enclosed. A subsequent letter dated February 22, 1991 indicated that I was terminated as of March 30, 1991. Again, no reason was indicated.

[14] Kanaby sat in at this meeting, but claims to have had no input into the decision. Curiously, since he took the position that the earlier discharge of Hanrahan was not authorized under the contract, he did not protest this discharge.

[15] Perhaps further insight into the matter of conflicting interests can be gleaned from a letter written by Union Vice President Schnell to Union Secretary/Treasurer Pahel, which, in pertinent part reads:

> Responding to the next paragraph concerning valid grievances and in first part talking with Robert Greene, he (Kanaby) should give the job to someone else who will talk to him, and if this is impossible you pursue ways of getting your points across at a higher level and with the use of legal council [sic]. Besides Hanrahan's grievance, the other grievances were also valid and were totally ignored by Frank (Kanaby), perhaps of the so-called two hat task that he cannot get himself to accept. All of us wear two hats, and there is a difference, but when you are in the position to wear the union hat, you better wear it as such, just as when you are in a corporate position, you wear that hat. Frank Kanaby can not get himself to wear the right hat when it is appropriate and that is the union hat. If you can make that distinction, you best leave it to someone that can and who will.
>
> To become a functional part of the Union (ILA), you protect and back to the fullest your membership, no matter what your personal feelings are, and this is not being done by some members of the Executive Board of Local 1921. It is quite obvious by their actions.
>
> January 24, 1992, a letter was sent to President Kanaby from Bill Hanrahan regarding his wrongful discharge grievance of March 24, 1991 and of what he has asked Local 1921 to help him in. To my knowledge as of this date (February 1992) nothing has been done. All he has asked for is a reply to that letter, and once more he is being ignored, unless he has since had a reply.

> The ad hoc screening committee that rejected registration was not approved by the Director of Pilotage as required by USCC CFR Title 46, Chapter III, Subpart B—Registration of Pilots section 401.211, paragraph (C).
>
> At the spring shareholders' meeting on March 28, 1991, a motion was made for my registration and seconded but was ruled out of order by President Robert Greene.
>
> The point is that Pilot Registration and confirmation has come down to the whim of one individual. I do not believe this was the intention when the Pilotage Act was drafted. There are many reasons for the present state of affairs, too many to list here; therefore, I am petitioning for an investigative hearing to look into this and other intentional violations of the Pilotage Act.

In October 1991, Hanrahan received a letter from Director Grady, which reads:

> We have reviewed the matter of your registration as a U.S. Great Lakes registered pilot in District 2, including the materials you have submitted, the recommendation of Lakes Pilots Association, Inc. and the discussions that Captain Robert North, USCG, had with you and with Lakes Pilots Association officials.
>
> There are some areas where you and Lakes Pilots Association agree, and there are areas of disagreement. I believe that one area of agreement is that an applicant pilot should be qualified to pilot vessels in the Maumee River, as well as in the other areas of District 2, before being registered.
>
> Based on the information available to me, the record supports your qualification to pilot vessels in most waters within District 2; however in my opinion, the record needs to be explicit with regard to your ability to transit the Maumee River. In an effort to resolve this matter in the fairest way possible, I am directing Lakes Pilots Association to provide you the opportunity to demonstrate your competency in the Maumee River. This will be done by having you make three one way trips in the Maumee River (to or from the grain terminals) under the observation of active registered pilots presently providing pilotage service in District 2. Two of the registered pilots are to be chosen by Lakes Pilots Association, and one by you. Prior to making the three trips, you will be given the opportunity to make familiarization trips in the Maumee River, and elsewhere within the District if you choose, riding with any other District 2 pilot. Please submit to me for my approval, the name of the ''observer'' pilot you select.
>
> Each of the pilots designated to observe you on these evaluation trips would provide a detailed report directly to me describing their view of your competency to pilot vessels in the Maumee River. The reports are due within 10 days of the completion of each of these three trips, but in no case later than December 31, 1991.
>
> Because of the unusual nature of this situation, I reserve the right to have my representative be present during the three trips you make with the approved registered pilot observers. This representative would not however, be along to determine your competency, but rather to oversee the process.

Grady sent a similar letter to the Association.

Hanrahan received another letter from Grady dated December 9, 1991. It reads:

> This is in response to your recent letters concerning your status as an Applicant Pilot within District 2 of the U.S. Great Lakes pilotage system.
>
> Notwithstanding the actions taken by Lakes Pilots Association, Inc. to terminate you, I have informed Lakes Pilots Association that you remain an applicant pilot as so designated by the Director, Great Lakes Pilotage, on May 31, 1988. Lakes Pilots Association has the obligation to tender you all emoluments attendant with such a status as have been afforded you in the past.
>
> This letter does not affect the directions given in my letter of October 28, 1991, regarding the opportunity to be afforded you to demonstrate your competency for possible registration as a U.S. Registered Pilot. However, due to the imminent end of the season and your inability to complete the observation trips into the Maumee River by December 31, the written reports of the three check rides will be due not later than 30 days after the opening of the 1992 season.

Grady sent a similar letter to the Association.

Hanrahan wrote the Association a letter dated December 16, 1991, which reads:

> With reference to Captain Grady's letter of December 9, 1991, the U.S. Coast Guard has ruled (401.211(e), 401.320 (d)(5)) that I remain an ''Applicant Pilot'' as designated by the Director in May of 1988 with its associated ''emoluments.''
>
> I will expect payment of all back wages, special payments, and pension benefits for the entire 1991 shipping season by the end of the pay period for December 23, 1991, whichever comes first. Additionally, I will require all prior established insurance benefits to be in place as soon as is reasonable by industry standards with a notification date of December 10, 1991.

4. Hanrahan files a grievance with the Union seeking backpay based on Grady's directive

The Association did not pay the backpay demanded. So Hanrahan requested the Union to pursue the matter for him. He did this in a letter dated January 24, 1992, which reads:

> Re: Wrongful Discharge Grievance—March 18, 1991
>
> Francis (Kanaby),
>
> Article XII - Subject to Regulations, on page 16 of the current Collective Bargaining Agreement states:
>
> > Any and all provisions of this Agreement shall be subject to any and all rules and Regulations adopted by the Great Lakes Pilotage Administration and shall not be construed contrary to such rules and regulations, treaties or laws of the United States affecting pilotage of vessels on the Great Lakes.

> Captain Fredric J. Grady (USCG) Director of Great Lakes Pilotage (GLP) representing the United States Code of Federal Regulations, Chapter III, Parts 401.211(e) and 401.320(d)(5) has ruled that I remain an Applicant Pilot as designated by the Director GLP and that Lakes Pilots Association Inc. has the obligation to tender all emoluments attendant with such a status as have been afforded in the past.
>
> As is stated in my grievance dated March 18, 1991, 'termination is neither legal nor acceptable.'
>
> As a member in good standing, I again demand that the Union Local 1921 act on recovering all back pay, special pays, pension contributions and all other benefits due me.
>
> Please reply by certified mail within ten business days.

The Union never responded to this letter nor did it take any action in response to it.

Grady wrote to Hanrahan in a letter dated February 11, 1992. It reads:

> My December 9, 1991 letter advised you that ''Notwithstanding the actions taken by Lakes Pilots Association, Inc. to terminate you, I have informed Lakes Pilots Association that you remain an applicant pilot so designated by the Director, Great Lakes Pilotage, on May 31, 1988. Lakes Pilots Association has the obligation to tender you all emoluments attendant with such a status as have been afforded you in the past.''
>
> So that there is no misunderstanding of that letter, Lakes Pilots Association has been instructed to confer upon you the same status you had when Lakes Pilots Association purported to fire you in 1990, i.e., the same status you held during those times you were generating revenue for Lakes Pilots Association. This means you must be afforded all rights and benefits to which you were entitled just prior to your purported firing. This would include, but not be limited to, use of Lakes Pilots Association facilities such as dispatching services and pilot boats, as well as entitlement to all personal benefits such as remuneration, insurance coverages, etc.
>
> The Coast Guard will not get involved in any dispute that you might have with Lakes Pilots Association regarding your demand for back pay or other ''past'' benefits for the period between your purported firing and the date of reinstatement. Matters such as those constitute a private civil matter between you and Lakes Pilots Association and should be resolved in whatever manner or forum either of you determine to be necessary.

Lakes Pilots Association put Hanrahan back to work on April 1, 1992, and he worked as an applicant pilot for the 1992 shipping season. He never received a response from the Union regarding his request that a grievance be filed over the matter of backpay.

On August 11, 1992, Hanrahan received the following letter from the then director of Great Lakes Pilotage for the U.S. Coast Guard:

> Your letter dated July 10, 1992, addressed to Admiral Kime and regarding the issue of your registration as a Great Lakes registered pilot, has been referred to me for response.
>
> Our position is that you have not satisfied the requirements contained in 46 CFR Parts 401.220 and 402.220 of the Great Lakes pilotage regulations with respect to round trips in the Maumee River. As indicated in the letter to you dated October 28, 1991, from the Director, Great Lakes Pilotage (Director), we feel that the record needs to be explicit regarding your ability to transit the Maumee River. In an effort to resolve this matter in the fairest way possible, the Director identified the mechanism and process for you to demonstrate your competency in the Maumee River.
>
> ''Positions'' 1 and 2 of your July 10, 1992 letter were considered by the Director prior to his letter to you and Lakes Pilots Association, Inc. (LPA) dated October 28, 1991, regarding the provisions for determining the demonstration of your competency in the Maumee River. You have been advised numerous times that the provisions described in the Director's letter remain valid.
>
> As I understand it, the matters which arose on July 10, 1992 are as follows: (1) A vessel was expected to be transiting the Maumee River inbound on July 12, 1992, and was also expect to be transiting the Maumee River outbound shortly thereafter. (2) With the matter of your registration in mind, LPA contacted you to advise you of the vessel's movement, and to determine your desires with regard to the demonstration of your competency in the Maumee River. (3) LPA was unsuccessful in determining your desires with regard to your demonstration of competency in the Maumee River aboard this particular vessel and contacted the staff of the Director. (4) The Director's staff attempted to contact you, but was unsuccessful until receiving the facsimile transmission of your July 10, 1992 letter.
>
> In ''position'' 3 of your July 10, 1992 letter, you indicate that you will not comply with the Director's letter of October 28, 1991. This is to advise you that you must successfully complete the provisions for determining the demonstration of your competency in the Maumee River described in the Director's letter to you dated October 28, 1991 prior to December 31, 1992.
>
> If you do not comply with the Director's directive of October 28, 1991 by December 31, 1992, or if you do comply, but it is determined that your are not competent to pilot vessels in the Maumee River, your temporary registration will not be renewed, and your applicant pilot ID card will be withdrawn or not renewed.
>
> If you do comply with the Director's directive of October 28, 1991 by December 31, 1992, and if it is determined that you are competent to pilot vessels in the Maumee River, you will be fully registered for all waters of Pilotage District 2.

Hanrahan received another letter from the Coast Guard director dated October 22, 1992, which reads:

> This is in response to your faxed letter of October 6, 1992, regarding familiarization rides on the Maumee River.

> In accordance with the October 28, 1991 letter to you and Captain Greene, you are allowed to make familiarization trips on the Maumee River riding with any District 2 pilot. However, this does not confer upon you the right to assign the pilot duly scheduled to provide pilotage service during these trips. You have been allowed to choose the District 2 pilot who will be riding with you only when you are completing one of your demonstration of competency trips.
>
> Captain Greene was in compliance with the Director's letter of April 1, 1992.

As far as the record is concerned, Hanrahan's appeal to the Coast Guard is still being processed. It does not have any bearing on the outcome of this proceeding.

Although it has no direct bearing on the issues herein, the following document placed in the record is interesting with regard to the changing positions of the Union with regard to Hanrahan. Pursuant to a complaint filed with the International Union, it prepared a report dated June 26, 1992, which reads:

> Pursuant to your letter of April 7, 1992 instructing us to investigate the alleged ''improprieties'' of L-1921, Dack Gabel, Vice President, Great Lakes District and James M. Piscioneri, Secretary/Treasurer, Great Lakes District, reviewed all correspondence received from President Frank Kanaby, L-1921 and William B. Hanrahan, member of L-1921 and have arrived at a determination that L-1921 did whatever they were asked to do to protect Brother member Hanrahan.
>
> The grievance Brother Hanrahan filed with L-1921 was to stop the corporation (Lakes Pilots Association) from terminating his employment.
>
> Local 1921 acted on this grievance and persuaded the corporation (Lakes Pilots Association) to reinstate Mr. Hanrahan.
>
> Mr. Hanrahan agreed with the decision handed down, but had reservations about his certificate as a full registered pilot.
>
> All other correspondence concerning certification as a full registered pilot and his dissatisfaction as to not being certified as a full pilot with back pay, benefits, etc., were directed to Captain Greene, President of Lakes Pilots Association and no grievance was filed with L-1921 on this matter.[16]
>
> Please refer to Collective Bargaining Agreement, dated April 2, 1991, Article 1-C, also Article III, Section D.
>
> Brother Hanrahan's health and insurance benefits were in effect until his discharge in August of 1991 and then restored in March of 1992.
>
> Mr. Hanrahan did state in his letter of April 16, 1991 to Francis Kanaby that he, Bill Hanrahan, had met all of the requirements for full registration as a certified pilot.
>
> It was further determined by this hearing that the only grievance filed by Mr. Hanrahan on March 18, 1991 was handled properly by L-1921.
>
> Mr. Hanrahan was re-instated as he originally requested.
>
> A letter of January 24, 1992, Mr. Hanrahan again requests recovery of back pay, special pay, pension contributions and all other benefits due him. This is the grievance letter and it was directed to Captain Greene.[17]
>
> In referring to Article III, D-2, (A), The Board of Directors has the right to lay off an applicant pilot. Local 1921 further states that they have no Bargaining Agreement with the U.S. Coast Guard. Local 1921 states that they will abide by their contract.
>
> In conclusion this committee finds that if Mr. Hanrahan followed proper procedures concerning the Local 1921 and the corporation (Lakes Pilots Association) in attempting to resolve these issues, it would not have been necessary to go to the N.L.R.B. as Mr. Hanrahan did. The issues would have been resolved by a neutral arbitrator.
>
> [Para. omitted.]

5. Conclusions with respect to the treatment of Hanrahan by the Association and the Union

Based on all the evidence presented, I find that the Union has failed to fairly represent Hanrahan when it failed to grieve the matter of the Association's refusal to recommend him for registration and its refusal to grieve for backpay as a result of Grady's order to the Association to reinstate Hanrahan. I find the reasons advanced by the Union for its failure to process the grievances are pretextual and the true reasons lie in the conflict of interests which exist by virtue of the union officers and in particular, its president, being shareholders in the Association. I also find that the failure to fairly represent Hanrahan was the result of the domination of the Union by the Employer, which is reflected by the domination of Kanaby by Greene. Thus, I find the Union's actions in this regard to be based on considerations which are arbitrary, invidious, irrelevant, and unfair, causing the Union to discriminate against its member Hanrahan because of his status as a nonshareholder employee of the Association. By its failure or refusal to fairly represent the Charging Party, the Union has violated Section 8(b)(1)(A).

Although the collective-bargaining agreement gives the Association the right to lay off applicant pilots, Grady's directive gave Hanrahan at least an arguable right to backpay. The record in this proceeding is not complete enough to determine whether Hanrahan would succeed in a grievance over backpay and therefore I will not recommend that the Union be ordered to make him whole in this fashion because of its failure to pursue his grievance. However, I will recommend that Union be ordered to process to arbitration the matter of backpay for the 1991 shipping season and the matter of the Association's refusal to recommend Hanrahan for registration. As noted in the Baker letter to Kanaby dated August 27, 1991, the matter of Hanrahan's competence is not what is at issue in determining the correctness of the Association's action with regard to the recommendation. Based on the screening committee's minutes, an arbitration panel would only have to decide whether (1) Hanrahan did serve

[16] This conveniently ignores the position taken by International Union Vice President Baker in his August 1991 letter to Kanaby.

[17] The letter was directed to Kanaby and requested the Union grieve the Associations refusal to give him backpay.

the requisite amount of time in training to qualify under the Coast Guard regulations, (2) Hanrahan did pilot vessels in Maumee River for the requisite number of trips, and (3) lack of sufficient business to continue Hanrahan's employment is justification under the Coast Guard regulations to refuse to recommend Hanrahan for registration. Further, the Association's General Rule 15(b) requires:

> No recommendation that a pilot be fully registered shall be submitted to the Director of Great Lakes Pilotage Staff until such recommendation shall be approved by the affirmative vote of the shareholders present in person at an annual or special meeting of the shareholders called in accordance with the by-laws of the Association.

There was never a vote of the shareholders on the decision of the board of directors not to recommend Hanrahan, at least not with notice that the matter would be considered at such meeting. This apparent violation of the rules could also be considered by an arbitration panel.

I find that the reasons that the Union did not pursue Hanrahan's requested grievances are not to be found in their excuses given at the hearing, but in the conflicting interests held by Union President Kanaby and the other union officers. As pointed out clearly by Union Vice President Schnell in his letter to fellow Union Officer Pahel, Kanaby was unable to carry out his duty to fairly represent Hanrahan because of his corporate position as a shareholder.

Hanrahan has objected to the arbitration procedure currently in place as it allows the Association to select one panel member, the Union to select one and to have one disinterested member. I agree with Hanrahan's objection because of the conflict of interest which exists with respect to the Union's relationship with the Association. I would recommend that any arbitration which results from this decision be before a panel consisting of one Association panelist, a disinterested panelist selected as called for by the collective-bargaining agreement and a panelist chosen from the International Longshoremen's Union. The International does not have a conflict of interest as does the Local Union.

Although arbitration of the matter of Hanrahan's recommendation for registration may not result in the Coast Guard extending registration to him, it will at least be a vehicle to determine fully whether the Association's action was truthful and honest. With this information, the Coast Guard may decide that its check ride directive was unnecessary or revise it in some manner to give Hanrahan another opportunity to qualify for registration. As matters now stand, the Coast Guard cannot be sure why Hanrahan was not recommended.

E. *The Association's 10(b) Defense*

Charging Party Hanrahan filed an unfair labor practice charge on April 30, 1991 (Case 7–CA–31833) alleging that the Association violated the Act by, among other things, discharging him ''without cause'' and by ''assuring [this] corporate objective by ''controlling'' the Union. Specifically, this charge states:

> 1. I was discharged without cause.
>
> 2. After filing a wrongful discharge grievance, I was not notified at any time between the filing supposed resolve of the grievance by the President of the Union and the President of the Corporation.
>
> 3. The President of Union Local #1921 was nominated and elected at a meeting of which I was given no notice.
>
> 4. The President of the Union was nominated by the President of the corporation.
>
> 5. The President of the Union Local is a recent, former member of the Board of Directors of the corporation.
>
> 6. The vacancy created on the corporate board was filled by the new President of the corporation.
>
> 7. Of the seven members present at the unannounced Fall Bi-Annual election meeting [of the Union]—all are direct stockholders in the corporation.
>
> 8. Of the twenty-two members in the ILA Local, fourteen are stockholders in the corporation. Only fifteen of the twenty-two are allowed to vote, fourteen are corporate stockholders.
>
> 9. Arbitration of any grievance is binding and final by a 3 member panel. The 3 member arbitration panel is made up of 1 corporate rep, 1 union rep, and 1 outside rep. Since the Union is controlled by corporate stockholders and picks the union rep, the corporation will end up with 2 corporate reps virtually assuring corporate objectives in any final and binding grievance.

Although the April 30, 1991 charge alleged that its specific factual allegations constituted a violation of Section 8(a)(1) and (3) of the Act, as part of its investigation, the Board looked into the possibility of domination by the Association of the Union. As a result of the investigation, the Acting Regional Director of Region 7 concluded that ''further proceedings are not warranted'' and dismissed the charge. He noted that:

> [T]he Charge also raises the possibility that the Employer has dominated Interlakes Pilots District No. 2, Local 1921, ILA, AFL–CIO, the Charging Party's' collective bargaining representative, by nominating members for the office of president, and by having a former member of the Employer's Board of Directors now serving as the Union's president. Inasmuch as domination of a labor organization of a labor organization by an Employer violates the NLRA, these matters were considered in our investigation of the instant charge.

The Acting Regional Director found no evidence of domination, explaining:

> The investigation demonstrated that Lakes Pilots was incorporated with the purpose of providing services to ocean going vessels on the Great Lakes. Lakes Pilots employs approximately 12-18 registered pilots. Pursuant to federal regulations, these pilots are shareholders of the corporation as well as employees. In addition, the pilots are also members of the Local 1921, ILA. There is no evidence within the last six months that any officer or member of the board of directors of the corporation simultaneously served as an officer of the Union. Because of the small number of shareholders in the cor-

> poration, all of whom are also Union members, approximately 50% of the shareholders/members will hold office as either an officer of the corporation or an officer of the union at any given time. Given the close knit nature of this operation, I do not find it violative of the Act for the President of the corporation to have nominated an employee shareholder member for the office of President of the Union, nor do I find it violative that the current President of the Union was a former member of the corporate board.

Hanrahan appealed this decision and his appeal was denied. On March 9, 1992, he filed a second charge against the Association, alleging that the Association unlawfully dominated Local 1921. The Acting Regional Director issued a complaint as a result of this charge. Respondent contends that consideration of the allegations of domination of the Union by it are barred by Section 10(b) of the Act, citing *Ducane Heating Corp.*, 273 NLRB 1389 (1985). I agree to an extent. The operative facts in this case which I believe establish a disabling conflict of interest and an unlawful relationship between the Association and the Union were in large part alleged in the dismissed complaint and known by the Region at the time of the dismissal. On the other hand, evidence in support of the March 9, 1992 charge includes the refusal of the Association to award backpay and lost benefits for the 1991 shipping season even in light of Director Grady's directive and evidence of the Union's refusal to grieve that decision. The March 9, 1992 charge alleges discrimination because of domination of the Union by the Employer. This timely evidence was used to support the proposition that there exists a disabling conflict of interest and domination of the Union by the Employer is not time-barred. Thus there exists an independent basis for the timely charge. I find that the charge brought on March 9, 1992, is closely related to the earlier dismissed charge and therefor the earlier allegations are not time-barred. The otherwise untimely allegations involve the same legal theory as the timely charge, the untimely allegations arise from the same factual circumstances as the timely charge and each would require the same or similar defense. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

Moreover, the limitations defense is not available to the Union herein, and a finding that its relationship with the Employer would require a similar finding with respect to the Association. For the reasons stated above, I do not accept Respondent Employer's 10(b) defense.

CONCLUSIONS OF LAW

1. Respondent Lakes Pilots Association, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Interlakes Pilots Association District No. 2, Local 1921, International Longshoremen's Association, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Respondent Union has been the exclusive collective-bargaining representation for Respondent Employer's employees in the following unit:

> All pilots and pilot boat (auxiliary) personnel employed by the Association, excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

4. By extending recognition to the Respondent Union, which is controlled and dominated by its members who are also shareholders and management employees of the Respondent Employer, and which members exercise control over nonshareholder members, the Respondent Employer has interfered with the administration of, and has rendered unlawful assistance and support to the Union in violation of Section 8(a)(1) and (2) of the Act.

5. By maintaining and enforcing a collective-bargaining agreement with Respondent Union which requires the employees covered thereby as a condition of employment to become and remain members of the Union, and which covers wages, hours and working conditions for employees in the above described unit, which includes non-shareholder employees, the Respondent Employer has violated Section 8(a)(1), (2), and (3) of the Act.

6. Because of the relationship between Respondent Employer and Respondent Union, there has resulted a disabling conflict of interest which has interfered with Respondent Union's ability to represent nonmanagerial unit employees, Respondent Employer has engaged in conduct in violation of Section 8(a)(1), (2), and (3) of the Act and Respondent Union has engaged in conduct in violation of Section 8(b)(2) of the Act.

7. By providing free office space and telephone service to the Respondent Union, the Respondent Employer has violated Section 8(a)(2) of the Act.

8. By being a party to and enforcing a collective-bargaining agreement with a union-security clause, despite the disabling conflict of interest found above, the Respondent Union has engaged in conduct in violation of Section 8(b)(1)(A) and (2) of the Act.

9. By its failure and refusal to process the grievances filed with it by its member William Hanrahan, the Respondent Union has breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondent Employer has engaged in activity in violation of Section 8(a)(1), (2), and (3) of the Act, I recommend it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It is recommended the Employer cease and desist from permitting registered pilot shareholders, including those in direct managerial positions and those who vote as shareholders in matters affecting the bargaining unit, from occupying positions in Respondent Union, or otherwise interfering with the administration of Respondent Union. It is further recommended that Respondent Employer cease and desist from giving effect to and enforcing the collective-bargaining agreement in effect between it and the Respondent Union to the extent that it applies to registered pilot shareholders. Respondent Employer should also cease and desist providing the Respondent Union with free office space and telephone service.

Having found that the Respondent Union has engaged in activity in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to ef-

fectuate the policies of the Act. I recommend that Respondent Union be ordered to, upon request of the Charging Party William Hanrahan, process his grievances over backpay and other benefits lost by his termination or layoff for the 1991 shipping season, and over the Respondent Employer's decision not to recommend him to the U.S. Coast Guard for registration as a U.S. registered pilot, to arbitration, if necessary. I further recommend that the Union be ordered to have the International Longshoremen's Association pick the arbitration panelist which the Respondent Union is entitled to pick under the parties' collective-bargaining agreement, with the proviso that no registered pilot employee of the Respondent Employer nor a shareholder in Respondent Employer may fill this position. The Union should be ordered to cease giving effect to and enforcing the collective-bargaining agreement to the extent it covers registered pilot shareholders in the Employer.

[Recommended Order omitted from publication.]